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REPORTS
OF CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT of TENNESSEE,
FOR THE
MIDDLE DIVISION,
AT THE DECEMBER TERM, 1879,
AND FOR THE
WESTERN DIVISION
AT THE APRIL TERM, 1880.

BENJAMIN J. LEA,
ATTORNEY-GENERAL AND REPORTER.

VOLUME IV.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

MIDDLE DIVISION.

NASHVILLE, . . . DECEMBER TERM, 1879.

THE STATE OF TENNESSEE, *ex. rel.* W. A. KNIGHT,
Trustee, etc., *v.* J. R. McCANN, Clerk. etc.

1. CONSTITUTIONAL LAW. *Salaries of public officers.* The Act of the Legislature of 1879, entitled "An Act to regulate and equalize the salaries of certain public officers," is unconstitutional, because repugnant to that provision of the Constitution which provides "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title."
2. SAME. *Act of Legislature. More than one subject. Title.* If an Act contains more than one subject, and only one subject is expressed in the title, the whole act is a nullity.

FROM DAVIDSON.

Appeal in error from the Circuit Court of Davidson County. FRANK T. REID, J.

Attorney-General LEA, T. L. DODD, and GEORGE B. GUILD for The State.

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2pi	379

State v. McCann.

E. H. EWING, JOHN L. T. SNEED, A. L. DEMOSS,
ED. H. EAST, W. A. THOMA, and BAXTER SMITH for
McCANN.

FREEMAN, J., delivered the opinion of the Court.

This is a petition for mandamus, filed in the Circuit Court of Davidson County by Knight, as Trustee, representing the County of Davidson, to compel the payment into the County Treasury of the sum of upwards of five hundred dollars, reported by McCann, as Clerk of the County Court, as having been received by him from fees of office from 1st of February to 1st of July, 1879.

This sum is reported as being the excess over and above the amount allowed by an Act of the General Assembly passed 29th January, 1879.

The Clerk, after making his report as required, declined to pay over this sum, hence this suit.

We take it, the case really stands before us as a case intended to test the constitutionality of the enactment referred to, and as such an unusual time has been allowed for its argument, that all parties might be fully represented and heard.

Both sides have been represented by counsel of the first standing and ability, from whose arguments we have had, probably, all the aid possible to be given in the solution of the questions presented.

We now proceed to give the results of our investigation, and the judgment of the Court on these questions.

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The following is the Act, so far as is necessary to quote it, for this discussion. It is entitled "An Act to regulate and equalize the salaries of certain public officers." It commences with the following preamble, expressive of the reasons for its enactment:

"Whereas, in some counties of the State Clerks of Courts and other officers *are* receiving from the fees of office as *allowed* by law, and from business incident to their office, by means of which they secure appointments the gift of courts and other appointing powers, sums greatly in excess of that allowed the Governor, or any of the Judges of the State; therefore,

Sec. 1. Be it enacted by the General Assembly of the State of Tennessee, That no Clerk of the Supreme Court, Clerk and Master of the Chancery Court, Clerk of the Circuit Court, Clerk of the Criminal Court, Clerk of the County Court, Trustee or Collector of Revenue, Register of Deeds, District Attorney for the State, or Secretary of State, shall receive, directly or indirectly, from fees, emoluments or perquisites of his office, nor as Commissioner, Trustee or Receiver, or from any position or place of trust or employment to which he may be appointed by any Court or Judge, any sum greater than two thousand dollars per annum.

Sec. 2. *Be it further enacted*, That every clerk or other officer enumerated in the first section of this Act, shall be required to make, under oath, and file with the Comptroller, if a State officer,

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and with the County Judge or Chairman, if a County officer, on the first Mondays of January and July of each year, a true exhibit of all fees, emoluments and perquisites of office, trust or employment of office, received by him for services performed as such officer for the previous half year, and shall pay over to the State Comptroller, if a State officer, and to the County Trustee, if a County officer, any amount so in excess of said sum, two thousand dollars, no matter whether said sum arises from fees, emoluments or perquisites, or order or direction of said Court as *allowed* by law, or for pay for services as Special Commissioner, Trustee, Receiver or otherwise.

Sec. 3. *Be it further enacted*, That any officer who shall directly or indirectly evade the spirit of this Act by connivance with any person or persons, or otherwise in any manner, shape or form, evade the same by making out an incorrect report, shall be deemed guilty of a misdemeanor, and for such offense, upon conviction, shall be fined not less than five hundred nor more than one thousand dollars, which shall go to common schools in this State, and the office be declared vacant."

Then follows three other sections—the fourth authorizing the *Comptroller* of the State to employ a clerk at a salary of one thousand dollars; the fifth giving the Judges of the Courts, and Chairmen of County Courts, the right to authorize their clerks to appoint deputies, fixing the fees for such deputies, with certain other limitations, regulations

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and restrictions not necessary to be referred to at present.

Sec. 6 gives like power to Judges or Chairmen of the County Courts, to authorize the Trustee or Collector of Revenue, under certain contingencies, to appoint one or more deputies to be paid out of the surplus of such office.

Sec. 7 gives like authority to Judges of Courts having exclusive criminal jurisdiction, when the business of their Courts shall require such an officer, to allow the Attorney-General to appoint an assistant Attorney-General, who shall be paid a salary not to exceed one hundred dollars per month, to be paid out of the surplus fees of the office of Attorney-General.

The Act took effect, it is provided, from and after its passage. We are called upon to decide the question whether this is a law or not. This is the real question in all cases, where the point of the conformity of an enactment of the Legislature to the Constitution of the State, or the Federal Constitution, is presented. The decision of this question by our American system has been imposed upon the Judiciary department of the Government. That duty is to be performed precisely as all other judicial duties should be performed, after careful and thorough examination, aided by argument of counsel, guided by authority, and in the exercise of the "clear, dry light of legal reason," uninfluenced by passion, prejudice, or the fear of consequences. We can as a Court neither

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desire that the result shall be the one way or the other. Perfect deference for all that is the law of the land should be felt by all, but, if possible, this feeling should be deeper and more controlling in the Judge than in all others. This feeling of devotion, however, can legitimately only find its proper exercise when applied to what is law, and not to everything that is enacted.

In proportion as we reverence law, *and the law*, should we feel it our duty to strike down whatever proposes or is proposed to take its place, when found not entitled to or able to make good that claim. If this enactment is a law, then its mandates are imperative, before which all must bend, and which all Courts must promptly enforce. If not, it is to be obeyed by none. Coming with all the accredited forms of an enactment of the Legislature, it is *prima facie* the law until the contrary shall be made to appear, clearly and satisfactorily.

The definitions of the term law, as found in our older text-books, and in the English writers, fail to express the American meaning of that term. Blackstone defines it to be "a rule of action prescribed by the supreme power in a State commanding what is right, and forbidding what is wrong." Without criticising the redundancy of this definition in the last clause, as well as some inaccuracy pointed out by writers, we may say that this gives no proper definition of a law in what may well be termed the American sense.

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In the first place we have no supreme organic power in a State, certainly nothing approximating to supremacy, or any proper idea of that term in any legislative or law-making body known to our system of government, whether State or Federal, supreme we may say within their sphere of action, but all limited by lines and barriers, theoretically at least definitely fixed, beyond which they not only have no power to act, but their acts must be held void, and infractions of the rule of right action prescribed for their conduct.

We might say properly that our Constitutions, State and Federal, are nearer to the idea of the "supreme power" in the State, when enforced, than anything else organically existent among us. This would not be a strictly accurate statement, and cannot be taken literally; for no law, whether supreme as a constitution, or inferior as an enactment of a Legislature, has any power whatever. Law in any form in which it may be found, or in any accurate meaning of the term, is utterly powerless. It can only give out influence, exercise power, when its requirements are enforced by intelligent will, directed to this end.

But passing from this, a definition of an American law will be sufficiently accurate for our present purposes, and possibly for all general purposes, as follows: A rule of conduct prescribed to the State or people thereof, in accord with the Constitution of the United States, and of the State, when enacted by a State Legislature. Other elements

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possibly might be added, bringing out the idea more fully, but this will suffice.

The question that presents itself in every enactment claiming to be a law is, does it conform to these Constitutions? If it does, then it is a law; if not, it has no title to reverence—is to be disregarded, declared null and void, and treated as never having been enacted.

This being the axiomatic rule in our system, it would seem to be a waste of argument to say that there can be nothing immaterial, nothing directory and which may be regarded or not, at the option either of the Legislature, Courts, or anyone else in these Constitutions. The mandates of these Constitutions must always be imperative. That which all are sworn to obey and enforce, from the Justice of the Peace or Constable, to the President of all the States, which is the test of all governmental power, must surely be obeyed by all functionaries at all times, in all places, and under all circumstances. In the sphere of law, these are the supreme laws—all else purporting to be law must stand or fall, as it conforms or fails to conform to these—must be either obeyed as effective and operative, or fall to the ground, as of no force whatever.

This conclusion would follow as a logical sequence from what is commonly stated to be the *power* of our Courts to declare a law void, when in violation of these Constitutions. This is not an accurate statement of the principle. There are no

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powers, strictly speaking, in the judiciary. It is all duty, and as such, imperative when the case arises where judicial action is to be done. It is true, there are what is known as discretions to be exercised by the judge, such as granting continuances, and the like, but all these are assumed to be exercised under the guidance and regulation of laws, and rules of practice well known, and *abuse* of these legal directions is promptly rebuked and corrected by the revising tribunals. Such being the true theory of our system, it follows that whenever there is a want of conformity to these Constitutions, it can never be passed over as indifferent, for the Courts, as guardians of the Constitution, under their oaths of office, have no discretion, and duty, which is always imperative, demands the violation shall be checked, and the Act to be declared a nullity. Either the Constitution or the Act must go down. There is no middle ground, and the Act must fall.

Says Judge Cooley, Const. Lim., pp. 2, 3: "In our American Constitutional law, the word '*constitution*' is used in a restricted sense, as implying the written instrument agreed upon by the people of the Union, or of any one of the States, as the absolute rule of action and decision for all departments and officers of the Government, in respect to all points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any Act or regulation of any such department or officer, or

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even the people themselves, will be altogether void."

"The term *unconstitutional law* must vary in its meaning in different States, according as the powers of sovereignty are or are not possessed by the individual or body which exercises the powers of ordinary legislation. Where the law-making department is restricted in its powers by a written fundamental law, as in the American States, we understand by unconstitutional law one which, being opposed to the fundamental law, is therefore in excess of legislative authority, and void. Indeed," he adds, "the term unconstitutional law, as employed in American Jurisprudence, is a misnomer, and implies a contradiction; that enactment which is opposed to the Constitution being in fact no law at all. For the will of the people, as declared in the Constitution, is the final law; and the will of the Legislature is only law when it is in harmony with or at least is not opposed to, that controlling instrument which governs the legislative body equally with the private citizen."

Such has been the holding of this Court in numerous cases, and such the uniform theory of the current of cases on constitutional law in our State, as well as in every other State of the Union, with the exception, perhaps, of one or two, where slight departures have been allowed—California and Ohio being the only ones we have noticed. See Const. Lim., pp. 149.

The cases in these States are referred to with marked condemnation of the principle by that able

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jurist. "The fact is this," he says, (and most truthfully,) "that whatever constitutional provision can be looked upon as directory merely is very likely to be treated by the Legislature as if it was devoid even of moral obligation, and to be therefore disregarded. To say a provision is directory, seems, with many persons, to be equivalent to saying that it is not law at all. That this ought not to be so must be conceded; that it is so, we have abundant reason and good authority for saying. If, therefore," he concludes, "a constitutional provision is to be enforced at all, it must be treated as mandatory; and if the Legislature habitually disregard it, it seems to us that there is all the more urgent necessity that the Courts should enforce it."

These are words of wisdom from the pen of the ablest constitutional jurist now in our midst, and well deserves to be pondered by those whose duty it is to administer the law, and enforce its mandates, especially in the Court of last resort.

Assuming these principles to be beyond dispute, we proceed to the discussion of the question that stands at the threshold of this case—its "Title," as expressing the subject of the enactment, and whether it contains more than one subject in its body.

Article II. of the Constitution of 1870, section 17, is: "Bills may originate in either House, but may be amended, altered or rejected by the other." This is the same as the Constitution of 1834, but the Convention thought proper to add "*No bill shall*

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become a law which embraces more than one subject, that subject to be expressed in the title." "All Acts which repeal, revive or amend former laws, shall recite in their caption or otherwise the title or substance of the law repealed, revived or amended." Whatever may be thought of the Constitution being directory, under other clauses, this is beyond all question mandatory. This Court has settled that question. In the language of Judge Nicholson, in *Cannon v. Mathes*, 8 Heis., 518: "The command is positive that no law shall embrace more than one subject, and it is equally positive that that subject is to be, or shall be, expressed in the title. To constitute a valid law under this provision, the bill must not embrace one subject alone, but that subject must be embraced in the title."

We are content to take the statement of the result of the authorities as given by Judge Nicholson as the point of law adjudged, as found in the conclusion of that opinion, as a fair statement of the principle embodied in this provision of the Constitution. He says, "It is obvious, therefore, that the true rule of construction as fully established by the authorities is, that any provision of the Act directly or indirectly relating to the subject expressed in the title, and having a natural connection thereto, and not foreign thereto, should be held embraced in it." The principle may admit of considerable latitude in its application, but the principle we believe has been conceded in all our opinions on this question to be sound.

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Conceding this, we proceed to bring this enactment to this test. The title is "An Act to regulate and equalize the salaries of certain public officers." Assuming the principle of construction of constitutions and statutes to be, as given by Chief Justice Marshall, 4 Wheat, 202-3, approved by this Court, Peck R., 437, that while the spirit of a constitution or statute is to be respected, not less than the title, that the spirit or meaning is to be collected from its words, we examine this title to see what is its natural and fair meaning from the language used. It is to "regulate and equalize the salaries of certain *public* officers." In fairness, it ought to be construed to mean, to regulate, so as to equalize, these salaries, as that is more nearly what was probably intended or in the view of the framer of this bill. To regulate, with the end of rendering equal, may be taken as its fair meaning, without any great strain on a liberal construction of the words.

The word "regulate" is defined by Webster to "adjust by rule or method, or established mode; to direct by rule or instruction; to subject to governing principles, as the laws which regulate the succession of the seasons," by way of illustration as he gives it.

The meaning of the language then is to adjust by a rule the salaries of certain public officers so as to equalize them. This of necessity implies the existence at the time of the public offices to be regulated, with salaries attached, or to be at-

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tached to such offices, by the rule there to be established. This must be so, or else we have the logical absurdity of a body enacting a rule for the action, and a mode of adjustment for that which is nonexistent. This we cannot attribute to a legislative body, nor is a fair meaning of the language used. This being the meaning of the language used in the title, and its fair construction, we look to the body of the Act and see if it conforms to it. Unquestionably the first three sections look to this subject (whether effective for the end or not we need not at present inquire), still these sections complete all that is probably fairly included in the title; at any rate, at this point this subject is for the time ended and complete. This we think can be demonstrated by looking at, first the preamble and then the substance of these sections.

The preamble, as said by this Court in *Trott v. McGavock*, 1 Yer., 473, (Cooper's Ed.) "is the key to unlock the mind of the Legislature," and the well established rule is to look at this to arrive at the intent and purpose of the Act.

That preamble is, "Whereas, in some counties of the State, Clerks of Courts and other officers are receiving from the fees of office as allowed by law, and from business incident to their office, by reason of which they secure appointments the gift of Courts, and other appointing powers, sums greatly in excess of that allowed the Governor, or any of the Judges of the State; therefore," etc.

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That is, to remedy the above enumerated existent evils, which are assumed to exist in certain offices, under the present existent regulations of the law, the enactment is to be made.

This is in precise accord with the construction we have given the language of the title—that is, that it refers, of necessity, to public offices, and offices where, by experience, these evils had been found, or were assumed to exist, and proposes that these offices or officers shall be regulated and their *salaries* equalized. Then follows an enunciation of the particular officers who are to be thus regulated and their *salaries*, as they are called, equalized—that is, rendered equal. We may remark here, that of those officers named, only one has any salary at all, and that we believe only in part, to-wit: the Secretary of State. But passing this, they are all named, from a clerk of the Supreme Court of the State down to a district attorney, and it is provided as the regulation on the subject named, to-wit: the “salary,” they shall none of them receive any sum greater than two thousand dollars.

It would have been, perhaps, more in accord with the real purpose of the Act to have said “shall not retain or keep any greater sum than two thousand dollars,” for the evident idea is that they are to go on and receive, as before, but shall not be allowed to keep what is thus received.

This, however, completely expresses the whole purpose of the Legislature as to the amount of salary to be received, that is, no more than the

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sum specified, and this sum is fixed on as the element of equality in the Act.

The next section (2) provides the means by which the amount received shall be ascertained, so as to make effective the regulation thus adopted, and requires a report, in case of State officers, to be made to the Comptroller of the State, and if a county officer, to the Judge or Chairman of the county court, of the amount of fees received, this report to be made on the 1st of January and July of each year.

The officer is then required to pay over to the Comptroller of the State, if a State officer, or to the Trustee, if a county officer, any amount in excess of two thousand dollars, from whatever source derived in his official capacity. And so this matter is regulated as to these officers who "are receiving from fees of office as allowed by law" such salaries as are deemed objectionable, and who are intimated in this preamble to have "used the money not very properly," by securing appointments, etc.

Then follows section 3, that fixes a penalty for failing to comply with these requirements, or attempting to evade them by making a false report, and these officers are to be deemed guilty of a misdemeanor, and for such offense, upon conviction, are to be fined not less than five hundred nor more than one thousand dollars, this money to go to the support of common schools in the State, and his office is to be declared vacant.

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We can scarcely conceive of anything else that could be added to carry out the expressed intention, so far as the form and correctness of this Act is concerned. The reasons for it are given in the preamble, with which we have nothing to do, except in arriving at its purpose. The regulation of the salary is established as the future rule on this question as the Legislature seemed to desire, and exactly as was desired, and the mode of ascertaining when one of these officers should receive in excess of the sum specified, to whom it shall be paid over, and then the penalty to be inflicted, and what the fine shall be appropriated to when incurred.

It is beyond all question that this comports with the idea or subject expressed in the title, and is included in it, and under it, because it professes and attempts to regulate existing offices, and the emoluments received from their employment, under the present regulations of these offices, under the then existing laws as to such emoluments, which are stated to be "received by them as allowed by law," that is, now allowed.

This, then, being demonstrated to be the meaning of the title, its subject may be, and must be, stated to be the regulation of existing officers' salaries or fees, so as to produce equality, as we have assumed in the preceding part of this opinion. This being its subject, all that is naturally and fairly included under this subject may be done by one law. Any regulation to equalize salaries of

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certain existent public officers is fairly within the scope of this subject. But it may be remembered, a law can have but one subject, "and that subject must be expressed in the title." It cannot embrace more than one subject and become a law, for the Constitution says: "No bill shall *become* a law which embraces more than one subject." If this provision is infringed, it is only a bill, it can never get beyond this and reach the dignity of a law, when tested by the Judiciary, whose business and duty it is to see that the Constitution remains supreme over all departments of government, as well as over the citizen.

We next look at the 4th section, and here we find a new departnre—an independent enactment—with reference to an office not then known to the law, or if so, legislated upon as a new creation, not being named as among the offices where the evils to be remedied existed, and an enactment is found as follows:

"Be it further enacted, That the Comptroller be and is hereby authorized to employ a clerk at a salary not to exceed one thousand dollars per annum."

Now, if this provision of the Constitution is to be held to have any meaning, this cannot be held to be a compliance with it. Could any man read this title and even suspect that it involved this subject, or had for its object the appointment by an officer of a clerk and to fix his salary arbitrarily at one thousand dollars? We opine not.

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The object is to regulate salaries and equalize them. Literally, this would require the bill to regulate the salaries legislated upon as to produce equality in them. But the first part of the bill, as the principle of equality, fixes the maximum at two thousand dollars for the officers regulated by it. Here is an enactment that is to be held as having the same end (if the law is to be sustained) which fixes the maximum at one thousand dollars. These salaries may be equalized by this process, but we are unable to see the principle, except we say that one thousand, as a maximum in the Comptroller's office, is the same or equal to a maximum of two thousand dollars in the case of the other enumerated officers.

We leave this question to be solved by those who may be able to do so. The writer of this opinion is unable to do it. On the face of the enactment, however, it has no relation to, or connection, either direct or remote, with the expressed purpose of the Act, with the subject proposed to be legislated upon in the title. It is independent legislation on a different subject, to-wit: the appointment of a clerk by an officer. That is evident from the body of the Act, and its specified offices and officers; it was not one where the grievances assumed to be remedied by the body of the Act, and referred to by the preamble, pointing to its purpose, had been found.

If the Act itself is to be held in its leading feature to have embodied the purpose or subject

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of the Legislature, so as to conform to the requirement of one subject, and that to be expressed in the title, then this subject, or the subject of this section, is not included in the subjects referred to in the title.

The Legislature itself having shown the subject by the leading provisions of the bill in the first three sections and preamble, we have but to take this, their own exposition of the subject legislated upon, to be sure that a clerk for the Comptroller's office is not included in this purpose. The Comptroller's salary is not regulated by the bill, nor intended to be. We may assume that none of the evils to be remedied had been found there. No need that the salary of that officer should be regulated, with a view to its equalization. But it seems to have occurred to some one that that officer needed a clerk to assist him in his duties, though his salary did not happen to need any equalization, and so he was given authority to appoint one, his salary, when appointed, not to exceed one thousand dollars, and it was so enacted. No doubt a proper piece of legislation, but in fact having no more connection or relation to the subject of the bill, as stated in the title, or as shown in its leading sections, than if the Mayor of the town of Murfreesboro had been authorized to employ a clerk as an amendment to its charter, with a like salary; or the town of Columbia to have an additional justice of the peace entitled to receive the fees allowed by law to that position.

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So far from effecting an equalization of what is called a salary in the bill of any officer, this salary is to be paid as the salary of other State officials generally are paid, out of the State treasury, and the appropriation bill passed by this same Legislature contains an item of two thousand dollars for its payment. Whose salary or fees is to be reduced, or regulated, or equalized by this, we have not been able to see, nor what possible connection it can have with the subject of equalization of salaries of the "certain officials" referred to in the preamble, we hardly think any man will be able to learn from reading this bill. In a word, we cannot see but what the appointment of a clerk by any other official in the State, or in fact, any other desirable enactment might not just as well have been inserted into this bill as the one here found.

If the Constitution is to be regarded as the supreme law, then a law containing more than one subject, and that one subject expressed in the title, is in violation of the Constitution, and must be held so as long as we adhere to the plain meaning of that instrument.

If a provision, that none of the enumerated officers shall receive more than two thousand dollars in any way from the fees or perquisites of their offices, is a regulation equalizing the salaries of such officers, as seems the view of the Legislature by this Act, then unless a clerk, to be paid one thousand dollars for his services out of the treas-

ury, in the Comptroller's office in some way tends to or is related to that desirable end, unquestionably there are two subjects legislated upon in this bill, and the latter is not referred to or expressed in the title of the Act, or we may add, is it seen that it can possibly have been conceived it had any connection with the purpose of the regulations established by the bill.

We need go no further. Either the Constitution must give way or the bill must. There is but one answer to this question. The Constitution must stand, and by its mandate no such "bill can become a law," the effort to make it so is abortive—and it must be held void in the performance of the duties of our position from which we dare not shrink.

The enactment being a nullity for this reason, we do not deem it proper to either refer to or discuss the other questions presented in argument as to conformity of the general or particular provisions of this bill to the Constitution, as it is not a law, these provisions as they stand in the bill are ineffective, and therefore do not call for construction or decision.

In conclusion, we but add that the provision of the Constitution is not of difficult understanding, may readily be conformed to by minds reasonably well versed in the language of our jurisprudence, by careful attention in the preparation of the bills proposed to be enacted. Such attention is a most desirable end to be attained in the action of our

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legislative body. A construction of the Constitution tending to produce this result, has much to recommend it as a matter of public policy.

Be this as it may, the theory of this Court is that the Constitution must control, and the principle is settled that whenever an enactment is in violation of that instrument, it must and will be declared void. This Act being such, is so declared.

The judgment is reversed, and the mandamus dismissed.

COOPER, J., dissents.

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1. CRIMINAL LAW. *Indictment.* An indictment which charges that the defendant was an employè of the Penitentiary, and as such "did aid, assist and suffer" a prisoner confined in the Penitentiary under conviction for a felony to escape, charges only one offense, and is good under the Code, §5540.
2. SAME. *Confession.* Upon the trial of the defendant for suffering a convict to escape from the Penitentiary, a confession of the defendant, induced by improper means, may be used to the extent of showing that it was thereby discovered that his wife had in her possession a draft and deed, dated shortly before the escape, the draft being drawn by a brother of the convict, and

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made payable to the defendant or his wife; and the deed being a conveyance of land executed by the convict's wife to the defendant's wife.

3. **SAME.** *Same.* The Attorney-General may, by an interrogatory to a witness, show that the State is willing to give the defendant the benefit of his explanation of the instruments thus discovered, and legitimately refer to the fact in reply to the argument of the defendant's counsel that the defendant's mouth was sealed by the law.

FROM DAVIDSON.

Appeal in error from the Criminal Court of Davidson County. J. M. QUARLES, J.

W. A. THOMA for Clemons.

Attorney-General LEA for The State.

COOPER, J., delivered the opinion of the Court.

The plaintiff in error was indicted for aiding a prisoner to escape from the penitentiary where he was confined under a conviction for a felony. The indictment contained three counts, each charging that the defendant "did aid, assist and suffer" the prisoner to escape. In the first count the defendant is described as an officer of the penitentiary, and as such did aid, &c. The second count is the same as the first, except that the defendant is described as an employè of the penitentiary. The third count differs from the others only in omitting the averment that he was an officer or employè. On the trial the defendant was convicted upon the second count.

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It is now argued that the second count of the indictment charges two offenses. This argument is based upon the ground that the Code, §5540, makes it a felony for any person to "aid" a convict to escape, and the second count of this indictment uses both words, "did aid and suffer." But the distinction between the two offenses does not turn upon the words aid or suffer. It consists in the fact whether the person was or was not an officer or employè of the penitentiary. If he was not, then the offense provided for in section 5539 can alone be committed, whether the offense was committed by active aid or mere sufferance. If he was an officer or employè, section 5540 would apply. The second count was under the latter section, and the words aid and assist were mere surplusage, or expressive of an act by which the defendant "did voluntarily suffer" the convict to escape. Only one offense is charged.

The defendant was employed in the penitentiary to drive a furniture cart, and, on the day of the escape of the prisoner, he had driven the cart into the penitentiary and taken out a load of furniture about the time or shortly before the convict was missed. The defendant, although sent for, kept away from the penitentiary for a day or two. When he did come, the Warden of the penitentiary and one of the lessees took him into a room and locked the door, and, upon certain promises, obtained from him a confession. What took place was detailed to the Judge in the absence of the

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jury, and he expressly excluded from the jury all the conversations and confessions, except the statement by the defendant that his wife had in her possession a draft and deed. These were sent for, and the wife, at the instance of the defendant, delivered them to the Warden. The draft was for money, signed by a brother of the convict who was suffered to escape, and was payable to the defendant or his wife. The deed was the conveyance of three lots in the State of Illinois by the convict's wife to the defendant's wife. Both instruments bore date shortly before the escape.

The error assigned is, that the Court admitted the prisoner's statement or confession in relation to the possession of the draft and deed. It is not denied that confessions, induced by improper means, may be used to the extent of showing that the prisoner had knowledge of the facts to the discovery of which his confession led. *Rice v. State*, 3 Heis., 215; *White v. State*, 3 Heis., 338. The argument is that the rule does not apply to this case, because the facts discovered have no necessary connection with the crime of which the prisoner is charged. We are unable to concur in this view of the law. It is true the facts before us cannot be said to have as direct a bearing on the offense as the discovery of stolen goods in the case of larceny. But they have a bearing, and a very palpable one, on the particular offense, nearly if not quite as much so as the discovery of goods taken from a burning building upon the crime of arson,

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for which the prisoner was tried in *Deathridge v. State*, 1 Sneed, 76.

The Attorney-General, after the Court had excluded all the evidence of confessions except so much as led to the discovery of the draft and deed, asked the witness what the defendant said as to where he got the deed and draft, and what was the consideration for them. The defendant objected, and the Court would not allow the question to be answered. Afterwards, in the argument of the cause, the defendant's counsel argued that the defendant could not explain the possession or consideration of the deed and draft referred to in the testimony, because his wife was incompetent to testify, and defendant's mouth was sealed by the law. To which the Attorney-General replied that the defendant could have taken the deposition of the parties who made the instrument; and, moreover, the State had offered to let what the defendant had said about them go before the jury, and the defendant would not permit it. It is said this was improper on the part of the Attorney-General, but we cannot see it in that light. The Attorney-General had the right to show by his questions that the State had no objection to the defendant's explanations, and his reply was a legitimate comment on the facts.

— There is no error in the record, and the judgment must be affirmed.

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4L 28
11L 23

DAVIDSON COUNTY v. P. OLWILL, use, etc,

G. K. WHITWORTH, Trustee, v. STATE ex. rel. JOHN
OVERTON.

COUNTY COURT. *Warrants. May bear interest when.* The County Court, as the representative of the county, may, in consideration of forbearance to sue, contract with a creditor of the county for the payment of interest on a county warrant after its registration by the Trustee, until there is money in the treasury to meet it in its regular order, but no longer.

FROM DAVIDSON.

Appeal in error from the Circuit Court of Davidson County. FRANK T. REID, J.

T. L. DODD for The County.

R. MCP. SMITH for Olwill.

COOPER, J., delivered the opinion of the Court.

These are agreed cases, gotten up for the purpose of testing the liability of the county of Davidson for interest upon county warrants, under orders of the County Court, intended to confer upon the holders of the warrants the right to demand and receive interest. The judgment in each case was in favor of the claim of the warrant

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holder, and the county in the one case and the County Trustee in the other have appealed in error.

Taking the warrant and the facts agreed in the first of these cases as fairly presenting the question sought to be raised, we find that Thos. S. Marr, for whose use the suit is brought, is the owner of a county warrant, No. 2,518, dated January 25, 1877, duly issued and made payable to P. Olwill, on account of St. Mary's Orphan Asylum, and by him transferred to Marr, for \$240. This warrant was presented to the County Trustee for payment, and stamped with the date of presentation, thus: "Registered March 5, 1877, Trustee's office, Davidson County, Tenn."

On January 6, 1880, the County Court made the following order, which was duly entered on its minutes:

"State of Tennessee, Davidson County. At the January Term of said County Court, on the first Monday of said month, the following proceedings were had:

"Whereas, about four years ago the County Judge was instructed by this Court to obtain from Judge Baxter an opinion on the question as to whether county warrants draw interest; and

"Whereas, Judge Baxter did give an opinion in which he decided that county warrants drew interest from date of demand and registration; and

"Whereas, the Justices of the County Court then assembled, in order to stop numerous lawsuits

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about to be brought against the county on past due county warrants, agreed that county warrants should bear interest at the rate of six per cent. from the date of registration; and

“Whereas, parties then about to bring suit stopped all proceedings against the county by reason of the said understanding and agreement; and

“Whereas, numberless suits are being brought against the county on county warrants; therefore,

“Be it resolved, by the County Court of the County of Davidson, That all legally issued county warrants now outstanding, and all county warrants hereafter issued, shall bear interest at the rate of six per cent. from the date of registration by the County Trustee.”

It is agreed that in 1875, it being disputed whether county warrants bore interest, Thos. S. Marr brought suit against the county on a county warrant in the Circuit Court, of which the Hon. N. Baxter was then the Judge, as a test suit, and on the trial, after argument, recovered a judgment for the amount of the warrant with interest thereon, at the rate of six per cent per annum, from the date of its presentation to the County Trustee for payment. The Circuit Judge was of opinion, and so held, that the warrant would bear interest after presentation. This suit was accepted as a test case by the county, and to avoid similar suits, the County Court, at a subsequent quarterly term, during the year 1875, ordered that thereafter the Trustee of the County allow interest accordingly, and that he

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should procure a stamp wherewith to stamp on each warrant the date of its first presentation to him for payment, which was done. It was the practice of the Trustee afterwards to stamp the warrants presented, and allow interest from that time. This practice continued until the recent decision of this Court in *Camp v. Knox County*, 3 Lea, 199. This order of 1875 was, however, not entered on the minutes of the Court. It was reduced to writing, and then duly passed and filed. This has been a frequent practice of the County Court in regard to orders of a legislative character. After the decision of this Court, many suits were brought, and many more threatened, with a view to reduce the claims against the county to an interest bearing form.

In order to prevent the accumulation of costs by suits, and in justice to those persons who had forborne to sue in consequence of the previous order of 1875, the order of January, 1880, was passed.

The holders of the warrants now in controversy claim interest on the same from the date of presentation to the Trustee, being subsequent to the passage of the order of 1875, and at any rate from the 6th of January, 1880, the date of the last order.

The Court below gave judgment for interest from the date of the presentation of the warrant.

In the case of *Camp v. Knox County*, this Court held, that the warrant of the Judge, or Chairman

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of the County Court, upon the County Trustee for the payment of claims against the county, was only a mode of reaching the money in the county treasury, and could not be treated as negotiable or bearing interest. With the soundness of these conclusions we are thoroughly satisfied. It was expressly said in that case that the power of the County Court to make contracts bearing interest was not involved. The decision only undertook to construe the character and quality of the warrant by which, under the provisions of our statute law, the payment of money out of the treasury was regulated, leaving open for determination the power of the Court to stipulate for the payment of interest, upon a sufficient consideration, as an incident to any contract which the Court could validly make. Other Courts have reached the same conclusions, and made a similar reservation: *Pekin v. Reynolds*, 31 Ill., 529; *Chicago v. People*, 56 Ill., 327; *Madison County v. Bartlett*, 1 Scam., 67; *Allison v. County*, 5 Pa. St., 351.

“Every county,” says the Code, “is a corporation, and the Justices in the County Court assembled are the representatives of the county, and authorized to act for it.” Code, 402.

By the next section it is provided that suits may be maintained against a county for any just claim as against other corporations, the process to be served upon the presiding officer.

Section 404 is: “Each county may acquire and hold property for county purposes, and make all

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contracts necessary or expedient for the management, control and improvement thereof, and for the better exercise of its civil and political powers: may make any order for the disposition of its property, and may do such other acts, and exercise such other powers, as may be allowed by law."

These provisions clearly confer upon the county corporate existence, with the right to sue and be sued, and hold property, and with power, through the Justices in County Court assembled, to make contracts touching its property, or for the better exercise of its civil and political powers. Unless controlled by other legislation, the authority would be ample to cover the action of the County Court in the present case, treating what is done as , in the nature of a contract in the exercise of its civil power.

By the Code, 4190, 4191, the number of Justices required to make appropriations of public money is prescribed. Section 4215 enumerates the purposes for which appropriations may be made, and section 4216 directs that no appropriation shall be made for any other purpose unless specially provided for by law.

By section 4195 it is enacted: "In making appropriations of money, the vote of the justices present shall be taken by ayes and noes, the Clerk calling and recording the name of each Justice, together with his vote, aye or no, as it is given, which shall be entered on the minutes, together with the items of allowance."

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These are wholesome and salutary regulations in regard to the mode of exercising the power of appropriating public money, and limitations of the power itself.

The County Court, as the representative of the county, cannot go beyond the authority delegated to it by the law. The question, therefore, comes to this, can the county, upon a sufficient consideration, contract for the payment of interest on any claim against it for which it is authorized to make an appropriation, and has made the appropriation?

Interest for money as a legal consequence was unknown to the common law: *Cherry v. Mann*, Cooke, 268. It has, however, been given by statute on judgments, and on a large class of assignable and negotiable instruments, and upon liquidated accounts signed by the parties: Code, 1942, 1945. It is defined by the Statute to be the compensation which may be demanded by the lender from the borrower, or the creditor from the debtor, for the use of money: Code, 1943. In all cases which are left as at common law, the jury has an equitable power, and may, in the form of damages, give interest, if they think justice demands it: *Cole v. Sands*, 1 Tenn., 106. Under our statutes and decisions interest has become an incident of debt after maturity, because either given by positive law, or in the absence of countervailing equity, by the inevitable verdict of the jury, or by the court acting in the place of the jury.

The power to sue and be sued, it has been

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held, gives to a municipal corporation the right to settle or compound claims: *Petersburg v. Mappin*, 14 Ill., 193; *Supervisors v. Bowen*, 4 La., 24. Growing out of its authority to create debts and incur liabilities, a municipal corporation has power to settle disputed claims against it, and an agreement to pay them is not void for want of consideration: *Augusta v. Leadbetter*, 16 Me., 45; *People v. Coon*, 25 Cal., 648. It may annex conditions to a proposal of settlement: *Merrill v. Dexfield*, 30 Me., 157. If it has obtained a contract which, by mistake or a change of circumstances, operates oppressively on the other party, an agreement to make an additional compensation or to modify and annul the contract, is not invalid for want of consideration: *Bean v. Jay*, 23 Me., 117; *Meech v. Buffalo*, 29 N. Y., 198. These principles equally apply to a corporation whose powers are limited whenever the particular contract is within the power granted. The rule as to interest on debts against a municipal corporation does not ordinarily differ from that which applies to individuals: *Langdon v. Castleton*, 30 Vt., 285. It has been held in Missouri, under a statute providing generally that creditors shall be allowed interest, that county warrants draw interest from date of presentment: *Robbins v. County Court*, 3 Mo., 57. In other States, county warrants have been treated as instruments bearing interest: *Clark v. Des Moines*, 19 Iowa, 199. In this State they are only checks or vouchers, and do not of themselves bear interest, nor do they

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extinguish the original debt for which they may be given. The creditor may sue on the original claim, and in some States he can only sue thereon: *Allison v. County*, 5 Pa. St., 351.

With these principles in view, let us see how the case before us stands. The County of Davidson is largely in debt, beyond its present means to pay, and liable to be sued upon demands, which have been legally allowed by its representative, the County Court, properly audited, and for whose payment warrants have been issued. If sued, the expenses of suit must be borne by the county, and the judgment which will be recovered will certainly bear interest, and the creditor may be also entitled to interest on his demand by law, or the jury may allow him interest by way of damages. The county might compromise the debt or the litigation. Why may it not in advance avoid the expense of litigation by stipulating that it will pay interest in consideration of the creditors' forbearance to sue? The costs of suit would be an incident of the demand for which the county would be liable, and the County Court would be compelled to appropriate the public money. So, interest on the debt would be an incident for which an appropriation must necessarily be made if given by law, or the verdict of a jury. An amicable adjustment by which interest is conceded in consideration of forbearance is within the competency of the County Court, whenever it is authorized to levy a tax, or appropriate the public money to pay

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the debt. And the rule would equally apply to past due obligations as to those now maturing or being created. For, if such obligations were sued upon, the jury would almost certainly give interest by way of damages, the delay to sue having been occasioned by the act of the county in sanctioning the allowance of interest on such claims.

It is obvious, however, that the County Court cannot, by a general order or resolution, make all county warrants bear interest indefinitely. That would be to nullify the decision of this Court, and the policy of requiring the prompt payment of county debts. Moreover, the power to bind the county for the payment of interest is not general, but special, and must be sustained by a consideration. It is, therefore, limited to the forbearance demanded by the public exigency. Strictly speaking, there should be a specific contract upon a definite consideration in each case. The difficulty and expense of a rigid enforcement of this rule in the case before us would neutralize the benefit sought to be obtained. The circumstances may justify a liberal construction of the order of the County Court, with a view to do equity as to the past transactions, where all parties have acted in good faith upon the same conception of their relative rights, and yet not throw open too wide a door for unwarranted license in the future. The County Court can only contract for the payment of interest on the county debt, in consideration of the creditor's forbearance, so long as that forbear-

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ance can be held to be for the benefit of the county, and that would only be until there was money in the county treasury to pay the warrant in its regular order: Code, 427, sub-sec. 4. After that, the liability of the county for interest ceases and the creditor must look to the Trustee and his official sureties, who then become liable for the interest, and the liability may be enforced by motion: Code, 3613. The law makes ample provision, by this section and sections 429 and 430, for the enforcement of the creditor's rights. Neither the creditor nor the County Court can charge the county with interest after the money in the treasury, subject to the creditor's call, is ready to meet his demand. The language of the resolution or order of the County Court, so far as it implies more than this for the future, is clearly *ultra vires* and void. The County Court cannot make a contract to pay interest on county warrants beyond the point of time when there is money in the treasury to pay them.

The resolution alleged to have been passed by the County Court in 1875, though never entered on its minutes, was simply void. The County Court must act in the mode prescribed by law. The fact can only be looked to as explanatory of the conduct of the county and its creditors, and as an inducement to the passage of the order or resolution of 1880.

The result is, that the latter resolution or order may be treated as a contract, with existing and

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future creditors, for the payment of interest on each of their warrants from the date of registration until there is money in the treasury, after the date of its passage, to pay the warrant, and no longer.

In this view, the judgments in the two cases before us are not erroneous, and will be affirmed.

**J. W. HORTON & WIFE v. MAYOR & CITY COUNCIL OF
NASHVILLE.**

4L 39
116 242

CHANCERY COURT. *No jurisdiction to compel municipal corporations to exercise legislative discretion. Damages.* The Court of Chancery has no power to compel a municipal corporation to exercise a power left to its legislative discretion, and therefore, a bill to coerce the construction of a sewer in a particular direction cannot be entertained; nor has the Court jurisdiction of a claim for damages, by reason of a defective sewer, except as an incident to some recognized ground of equity.

FROM DAVIDSON.

Appeal from the Chancery Court at Nashville
J. M. QUARLES, Sp. Ch.

Horton v. Mayor and City Council.

W. H. HUMPHREYS and J. W. HORTON, for complainants.

Summary of brief of W. H. HUMPHREYS, for complainants:

The bill charges the flooding of cellars and the contamination of the atmosphere, from time to time, of houses and street, by the bursting and leaking of a sewer constructed by the city authorities. This is an indictable nuisance, whether committed by individuals, private or municipal corporations, by Code and by common law. Code, secs. 4884, 4913, 4915, "deposit of filth, offal and noisome substances." Bishop title Nuisance; *People v. Albany*. 11 Wend., 539, pond of putrid matter. *State v. Shelbyville*, 4 Sneed, 176; slaughterhouse, 6 Best & Smith, 609; stagnant sewage in canal; 19 Howard, 290, citing conviction of Boston of sewer nuisance: Wood, 488. The court orders the sheriff to abate on conviction, at the defendant's expense. Code, secs. 4834, 4913, 4915; 6 Parker, 22. Municipal corporations may abate without conviction by order to police force: 18 Ark., 252. Where an indictable nuisance exists there is a remedy by action by parties injured: 1 Black, 39. And a remedy by abatement by bill 9 Moak, 530. Actions may be maintained for improper grade of sewer, improper dimensions, want of repairs, or obstructions resulting from design or negligence, from which defects injury necessarily results to individuals. "The right to construct a sewer does

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not include the right to create a nuisance;" they must be so constructed and so managed as not to create a nuisance; 18 Am., 187, Mass. "When a nuisance appears there is an excess of jurisdiction." Per Cocley, 35 Mich., 300; 74 N. Y., 265; 66 N. Y., 297; 22 Am., 471, 47 Ga., 263; 108 Mass., 265. 50 Mo., 510; 19 How., 290; 30 Ind., 237; 104 Mass., 13. The structure itself is *ultra vires*. The city authorities had no right to appropriate private property for the construction of a sewer when they had a practicable and reasonable line to the designated point by street and alley, costing nothing and injuring no one, It was a trespass and *ultra vires*: 15 Barb., 210; 30 Barb., 494; 8 Moak., 837; 2 Swan, 540; Story, 927, 955; Daniel, 1630; 4 M. & C., 251. This to be ascertained by survey: 8 Rich. Eq., 211; 6 Cush., 65; 2 Hum., 554, 471. Individuals, private and public corporations, boards of health and commissioners of sewers and other public functionaries, are subject to be restrained from creating or continuing nuisances. The right to pure air and pure water are primary rights, and entitled to constitutional protection. Birmingham, Leeds and other cities restrained from discharging contents of sewers into streams. Leeds pleaded that it had no other means of disposing of its sewage than by discharging the contents of its sewers in the Ayre, as it had done. This was held no defense for violation of substantial legal rights. Navigation of the Thames protected from obstruction by commercial fixtures erected by the

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city of London; North River protected against authority of the city of New York, and commercial fixtures ordered to be removed as a nuisance; license of the city of Charleston held no protection for cotton press; New York City prohibited from erecting depot for emigrants on city property, or permitting it to be done; 3 Barb., 225; Story, 925; 4 K. & D., 525; 2 Mylne & C., 129; 26 N. Y., 154; 11 Rich. Eq., 211. The liabilities of cities are the same as those of individuals, by action by indictment and by bill: Willard, 400; Wood, 472, 473, 474. The decree may be merely prohibitory, or it may prescribe what shall be done, as that a ditch be filled: 11 Cal., 104; that a dam be reduced in height two feet: 2 Sumner, 297; or removed entirely: 1 Tenn., 199; 1 Hum., 133; that water pipes laid down be taken up: 8 Moak., 40. that a stream diverted be restored in twelve months and that plaintiff have damages for the diversion: 40 N. Y., 191; that a draw be constructed of specified dimensions in a bridge to open navigation: 13 How., 630; that a stairway in the street be prohibited and balcony be removed: 6 Heis., 440; that county courts opening a "shunpike" road be compelled to close it as a nuisance to a franchise: 8 Hum., 354; that corporate authorities shall not deliver sewage into a stream, and that they shall close a sewer: Daniel 2303, 1638; and so it is contended municipal authorities can be compelled to extend a sewer, not on the ground of public expediency, but on the ground that the sewer creates

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a nuisance, and that the extension, so far as is necessary to abate that nuisance, is the best means of accomplishing the object, as shown by the engineer's report. When a sewer necessarily creates a nuisance, as demonstrated by time, the abatement may necessarily compel a modification of the sewer. It is an unlawful structure and *ultra vires*. It is no invasion of discretionary power, for they have no discretion to violate the rights of property and of the public. The jurisdiction is "a valuable superintending jurisdiction to confine public functionaries and public corporations within the boundaries of law." *Frewin v. Lewis*, 4 Mylne & C., 254; Story, 955; A. Daniel, 1630; Wood, 754. The prayer for abatement and the prayer for general relief contained in the bill are prayers for all the relief a court of chancery is competent to give in the premises, extension included; and they are prayers for all the writs authorized by the Code, such as writs of *fi. fa.* for damages, writs for possession, and writs of injunction, without any special application therefor; for such writs are writs of execution, and if special application were necessary the bill could be amended at the hearing: Code, 4488; Daniel, Cooper's ed., 398, 1614; 12 C. C. Green, 155, 189; Hicks., 221; 6 John Ch. 1; 4 Page, 219, 248. Bills for unliquidated damages are not entertained, but when a nuisance is abated, or waste or trespass restrained, or contracts enforced specifically, or trusts enforced, or dower decreed, or other equities are enforced, the court may decree dam-

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ages, liquidated or unliquidated, in order to close the litigation. The Act of 1877, ch. —, does not repeal this jurisdiction over damages, but was intended to leave that jurisdiction as it was before: Story, 794, 797, 1314, 516, 527; 40 N. Y., 191; 8 Rich Eq., 40; 1 Hum., 1; Wood, 778; 43 N. H., 249, 499.

The Legislature having authorized a trial of facts by a jury in the chancery court as in the circuit courts, when demanded, and prohibited jury trials in chancery and circuit courts, when not demanded, and authorized the court to decide questions legal and equitable in cases of which it has jurisdiction, it would seem that the court had authority to decree damages, though the equitable relief be not granted. This is the law in England, and is stated by high authority to be the law in two-thirds of the States. Code, 4455, 3008; 2 Johns & H., 555; 1 Degex, 488r 8 Moak, 837; 13 Moak, 564.

Complainants cannot be deprived of their right to abate an existing indictable nuisance by contamination of the atmosphere, by the fact of its long continued existence. The structure is illegal as to the public and as to individuals: Wood, 725, 828; 1 Bax., 55; 76 N. C., 676; 27 Texas, 304; 9 Wend., 315; 6 Parker, 763. Nor can they be deprived of this right by acquiescence short of twenty years in a case of private nuisance: 1 Bax, 355; 1 Hum., 410; 11 Hum., 166; if at all where the air is contaminated by a sewer: Story, 929, D. Nor can assent given for the construction of the

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sewer constitute a defense, unless it was given with a knowledge that a nuisance would be created by the structure: Wood, 986, 524, 860, and authorities there cited.

W. K. McALISTER, for defendants

COOPER, J., delivered the opinion of the Court.

The Chancellor overruled a demurrer to the bill, and the defendant appealed.

It appears from the bill as amended, and as it comes before us, that complainant, Anna E. Horton, wife of J. W. Horton, became, on February 20, 1875, the owner for life, with remainder to her two children, by deed of gift from her father, of an improved lot on Broad street, in Nashville, fronting twenty-three feet eight inches on Broad street, and running back one hundred feet. In the year 1872, the corporate authorities of the city constructed a sewer across Broad street, and under the house erected on said lot, and other houses adjoining thereto, upon a lot in the rear, and thence by open drain into Wilson's Spring branch.

This sewer was at first sufficient for the purpose intended, but the corporate authorities from time to time constructed other sewers and surface gutters, and connected them with the original sewer, whereby the latter became the only means of escape for the water and foul drainage of a large additional territory, the rainfall of which territory

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would not naturally flow upon the property in question, but would find its way to the river in other directions. The result is that the volume of drainage, in hard rains, breaks open the sewer under the house, injuring the walls and articles stored therein, rendering the cellar valueless, and, by filling the upper rooms with foul gases and effluvia, making the building unhealthy, and unfit for either residence or business. The sewer has also been permitted negligently, from time to time, to become obstructed, so that the property of complainant, and other property on both sides of Broad street, were flooded by sewage and injured. On September 30, 1876, the city engineer called the attention of the corporate authorities to the insufficiency of the sewer for the drainage thrown upon it, and to the necessity of a new sewer along Broad street to the river. On March 26, 1878, the Mayor of the city, in a message to the common council, called their attention to the condition of the sewer, and recommended the construction of a new sewer along Broad street to the river. And just before the filing of the bill, on October 1, 1878, the complainants petitioned the corporate authorities for a removal of the nuisance and for damages, without avail. The prayer of the bill is that the corporate authorities be, by the final decree, compelled to construct a sewer along Broad street to the river. and such other side drains as may be necessary to secure the health of the city, and remove the nuisance created by the defective sewerage mentioned,

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and that complainants be allowed such damages as may be just and proper for the injuries sustained.

The main object of the bill is to compel the city, by mandatory decree, on final hearing, to construct a new sewer from complainant's lot along Broad street to the river, a distance, as shown by the bill, of 1,660 feet. The ground of demurrer assigned to this part of the relief sought is, that the building of a public sewer by a municipal corporation is the exercise of a legislative discretion, which the Court will not control. And to this effect are the authorities.

The reason for the rule has been admirably stated by Denio, C. J., in *Mills v. City of Brooklyn*, 32 N. Y., 495. "It is not the law," he says, "that a municipal corporation is responsible in a private action for not providing sufficient sewerage for every or for any part of the city or village. The duty of draining the streets and avenues of a city or village is one requiring the exercise of deliberation, judgment and discretion. It cannot, in the nature of things, be so executed that in every single moment every square foot of the surface shall be perfectly protected against the consequence of water falling from the clouds upon it. This duty is not, in a technical sense, a judicial one, for it does not concern the administration of justice between citizens, but it is of a judicial nature, for it requires, as I have said, the same qualities of deliberation and judgment. It admits of a choice of means, and the determination of

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the order of time in which improvements shall be made. It involves, also, a variety of providential considerations relating to the burdens which may be discreetly imposed at a given time, and the preference which one locality may claim over another. If the owner of property may prosecute the corporation on the ground that sufficient sewerage has not been provided for his premises, all these questions must be determined by a jury, and thus the judgment which the law has committed to the city council, or to an administrative board, will have to be exercised by the judicial tribunals. The court and jury would have to act upon a partial view of the question, for it would be impossible that all the varied considerations which might bear upon it could be brought to their attention in the course of a single trial. Such a system would be as vexatious in practice as unwarranted in law." The distinction between the political or discretionary powers of the governing body of a municipal corporation and the exercise by the corporate authorities of ministerial powers is everywhere recognized. Dill. Mun. Cor., § 753, 778, and cases cited.

No authority has been produced tending to show that a Court of Chancery has ever undertaken to compel a municipal corporation to construct a sewer in a particular direction, or of specified dimensions. If such a power exists in the Court, it may be exercised to control the discretion of the local legislature in opening, grading and improving streets,

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or in any other matter about which that body may be authorized to legislate. The corporate functions would no longer depend upon the deliberate action, after consideration of all the circumstances, including the ways and means, of the municipal council, but upon the verdict of a jury or the decree of a court. Both reason and authority are against the power of the Chancery Court to grant the relief sought.

The remaining object of the bill is to recover damages for the injury sustained by the complainants by the overflow of the sewer, either by reason of its insufficiency in size to carry off the drainage, its defective construction, or its being negligently permitted to become obstructed.

Although the city authorities are entrusted with a discretion in regard to constructing drains and sewers in the first instance, yet when they have constructed them it is probably their duty to keep them in proper repair and free from obstruction. *Mayor of N. Y. v. Farze*, 3 Hill, 612; 1 Denio, 601; *Hutson v. Mayor of N. Y.*, 9 N. Y., 163; *Barton v. City of Syracuse*, 36 N. Y., 54; *McCarthy v. Syracuse*, 46 N. Y., 194; *Meares v. Wilmington*, 9 Ind., 73. And they are liable in damages for a neglect of these ministerial duties by which individuals suffer injury. It is certain also that equity has jurisdiction to enjoin and abate nuisances. 2 Story Eq. Jur., sec. 925; 2 Dan. Ch. Pr., 1635. And this jurisdiction is not interfered with by the

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provisions of the Code conferring on the courts of law the power to abate nuisances in proper cases: *Lassater v. Garrett*, 4 Bax., 368. The continuance of a nuisance is also a new offense: *Nashville & Decatur R. R. Co. v. State*, 1 Bax., 55. But the jurisdiction of equity to give damages is incidental to its jurisdiction to interfere by injunction, or upon some recognized ground of equity. 2 Story Eq. Jur., § 796, 924. A suit for damages merely cannot be maintained, and is not authorized by the Act of 1877, ch. 97, which expressly excepts from the new jurisdiction conferred all causes of action for injuries to property involving unliquidated damages.

The bill before us does not ask either a temporary or perpetual injunction of any kind. Nor is it easy to see how it could. The sewer complained of must have been constructed with the knowledge and acquiescence of the owners of the property at the time. The complainants have, perhaps, neither the right nor the inclination to abate it *in toto*. What they want and ask is a new sewer altogether and damages for the injuries done. The former the Court cannot give, for the reasons stated, and the remedy for the latter is at law.

Reverse the decree and dismiss the bill with costs.

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THE STATE *et al* v. W. D. COVINGTON.

JUSTICES OF THE PEACE. *No jurisdiction to enforce lien for unpaid taxes.* Justices of the Peace have not the jurisdiction of a Court of Chancery, under the Code, §4123, subs. 7, and §4124, to enforce a lien on land for the taxes assessed thereon where the amount of the taxes does not exceed fifty dollars.

FROM DAVIDSON.

Appeal in error from the Circuit Court of Davidson County. FRANK T. REID, J.

Attorney-General LEA & JOHN RUHM for the State.

ALLEN & COVINGTON for Covington.

COOPER, J., delivered the opinion of the Court.

On the 4th of February, 1880, a warrant was issued by a Justice of the Peace to a Constable, commanding him to summon W. D. Covington, to answer the State of Tennessee and County of Davidson "in a plea that he is indebted to them for taxes for the years 1869, 1874, 1876 and 1878, on the property described in the 'Exhibit filed,' for which, with costs, interest, &c.," the plaintiffs say they have a lien on the property described, which they ask to be enforced by a sale of the property on time, free from the equity of redemption,"

4L 51
9L 341

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the amount claimed being under fifty dollars. The exhibit attached to the warrant gave the items of taxes, interest, &c., and described the lot of land on which the taxes were claimed to be a lien. The warrant was executed on the defendant. He appeared before the Justice at the time and place fixed for the trial, and pleaded orally that the Justice had no jurisdiction, which plea was overruled. The defendant then insisted that the proceedings should be by bill as in a Court of Chancery, and that he would have the right to demur, plead or answer thereto. The Justice so ruled, to which ruling the plaintiff excepted.

It was then agreed to waive formal pleadings, and to allow the Justice to try the case as upon bill and answer, the bill asking for a sale free from the equity of redemption. The Justice thereupon gave judgment for the plaintiffs against the defendant for the amount of taxes claimed, with interest and costs, declared the same a lien on the land, ordered the defendant to pay the judgment and costs within thirty days; and in case of failure, that execution issue to be levied on the land, and the papers returned to the Circuit Court for condemnation and sale. Both parties appealed to the Circuit Court. In that Court the defendant admitted that he owned the land, and that the taxes were due thereon as claimed.

The Circuit Judge was of opinion that the Justice of the Peace had jurisdiction to enforce the lien for the taxes, the amount being under fifty dollars,

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and that the motion to dismiss the proceedings for want of jurisdiction was not well taken. He was also of opinion that it was not necessary to proceed by bill and answer as in a Court of Chancery, but that the suit was properly brought by warrant, and could be conducted orally as in other cases. He affirmed the judgment of the Justice, and declared the recovery a lien on the land. His Honor at first ordered a *procedendo* to issue to the Justice directing him to sell the land, or a sufficiency thereof to satisfy the the judgment, on a credit of six and twelve months free from the equity of redemption, but afterwards struck out the award of a *procedendo*, and ordered a *venditioni exponas* to issue to the Sheriff to sell the land upon the terms of the judgment. Both parties again appealed to this Court.

The proceeding, it is conceded, is altogether new, nothing of the kind having ever before appeared in the judicial history of this State. No wonder, therefore, that the lawyers, the Justice, and the Circuit Judge were somewhat at a loss to know exactly what to do; nor, in truth, that we should be rather in the same quandary.

This Court has recently held that the Chancery Court has original jurisdiction, independent of any statute, to enforce the statutory lien on land for the taxes assessed thereon in favor of the State, County, or municipal corporation, even after a sale of the land for the taxes where the land had been bid in by the party entitled to the taxes, and that

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party waives the rights thereby acquired. *State v. Duncan*, L. J. and Rep., 41; S. C., 3 Lea, 679. It was found that in a large number of cases the taxes fell below fifty dollars, the minimum limit of Chancery jurisdiction by statute when made to depend exclusively upon the amount of the demand. The object of the proceeding under consideration was to test the question whether the jurisdiction, declared to be in the Chancery Court, for the enforcement of the lien for taxes on land might not be held to exist in the Justice's Court where the amount was under fifty dollars. It has long been the settled law of this State, that taxes might be collected by warrant before a Justice of the Peace. *Mayor, &c., of Jonesborough, v. McKee*, 2 Yer., 167. It seems, however, that this mode of proceeding would not meet the difficulties in the way

Owing to the forms of assessment and the changes of title by sale of the land, it was found necessary to call in aid the powers of a Court of Chancery to ascertain and declare the rights of the parties, and to secure a prompt and valid sale of the property. The present suit was only the first step in the direction of declaring the Courts of Justices of the Peace clothed with full Chancery jurisdiction for all purposes, where the amount in controversy was under fifty dollars. Those Courts have always, heretofore, been considered as exclusively courts of law, with only such jurisdiction as is positively conferred by statute, and without any of the powers of a Court of Chancery in the

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administration of equitable rights according to the peculiar forms of that Court. We are now asked to turn those Courts into Courts of Chancery for "small cases." By the Act of 1817, chap. 86, § 1, it was provided that on trial of all suits before a Justice of the Peace, or any of the Courts, where the subject matter does not exceed fifty dollars, the Justice or Court shall hear and determine such cause upon its merits, and hear parol or other legal evidence to impeach the consideration or validity of any bond or note, as well those with as those without seal.

By Act of 1858, chap. 56, §3, the Act of 1817 was so amended as to authorize Justices of the Peace, and any of the Courts before whom a cause is pending, where the subject matter does not exceed fifty dollars, "to hear and determine such cause upon principles of equity, and to render such judgment or decree as the merits of the case may require, as fully and in the same manner as Courts of Chancery now do." These statutory provisions were brought into the Code by section 4123, sub-sec. 7 and section 4124. The first of these sections undertakes to enumerate the civil cases to which the jurisdiction of Justices of the Peace extends, and among others, by sub-sec. 7, says: "To all equity causes where the subject matter does not exceed fifty dollars." The second section defines the equity jurisdiction, and in the very words of the Act of 1858: "Any Justice of the Peace, and any Court of this State, before whom any cause may be pending, by appeal or

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otherwise, where the subject matter does not exceed fifty dollars, shall hear and determine such cause upon principles of equity, and render such judgment or decree as the merits of the case may require, as fully and in the same manner as Courts of Chancery." Code, §4124.

Reading the two sections together, it is clear that the "equity causes" of the first are those causes, where the subject matter does not exceed fifty dollars, which the Justice is required to "hear and determine upon principles of equity." These causes are such as "may be pending before the Justice," or "any Court," in the usual and ordinary course of business, according to the character of the Court, or the jurisdiction expressly conferred by statute upon Justices of the Peace. The Code no where vests Justices of the Peace with any of the powers of a Chancellor, or a Justice's Court with any of the extraordinary jurisdiction of the Court of Chancery. All that it undertakes to do is to say that when any case comes before a Justice under the express jurisdiction elsewhere conferred upon him, and the amount does not exceed fifty dollars, he shall hear and determine it upon principles of equity, and the case of *Williams v. Wilhoite*, 3 Head, 344, exactly illustrates the power intended to be given. There the plaintiff sued the defendant for the interest which had accrued upon a note given for land between its maturity, when the principal was tendered by the vendee, and the time when the vendor was able to make a good title,

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and the principal was actually paid. "A Court of Equity," it was said, "would not tolerate such a demand," and therefore the Circuit Court, deciding the case upon "principles of equity," properly refused to give the plaintiff a judgment, the amount sued for being less than fifty dollars, and the case falling precisely within the provisions of the Code, section 4124.

Some stress is laid upon the use of the words "render such judgment or decree;" but the words "judgment and decree" by the Code, section 2970, are made interchangeable, and by section 2974, such and so many judgments, joint, separate and cross, may be rendered as may be necessary to the rights of the parties at law as well as in equity. It cannot under these circumstances, be seriously urged that the use of the word "decree" in section 4124, confers upon a Justice and the Circuit Court all the powers and forms of a Court of Chancery. The Justice can only exercise the jurisdiction expressly conferred upon him, and whenever, within that jurisdiction, a case comes before him for an amount not exceeding fifty dollars, he must decide it upon "principles of equity." If his judgment or decree involves the sale of land, even in the enforcement of a lien, our statutes require that the papers shall be returned into the Circuit Court for the condemnation and sale of the land. Code, secs. 3537, 3547.

The policy of our law has been to secure record evidence on the minutes of a Court of Record of

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the transmission of title, whenever real estate is involved in proceedings before a Justice. In no case has it ever been held that a Justice can enforce a lien on land unless the jurisdiction has been expressly given by statute. The settled policy of the State on this subject ought not to be set aside upon the mere words of a statute, even if they admitted of the meaning contended for, after an acquiescence, by the Legislature and the profession, in a different construction for over twenty years, since the 1st of May, 1858, when the Code went into operation. Nor is there any necessity for making a radical innovation upon our judiciary system to meet a supposed want. For although by the Code, section 4281, Chancery Courts are declared to have "no jurisdiction of any debt or demand of less value than fifty dollars," yet this restriction only applies when the jurisdiction turns wholly upon the amount involved. If the jurisdiction to grant the relief sought is exclusively conferred upon the Chancery Court, the limitation does not apply. It cannot be supposed that the Legislature intended to deprive the citizen of redress, no matter how small the amount involved may be, when the only Court clothed with jurisdiction is the Chancery Court.

Accordingly, it has been twice held by this Court in unreported cases, the last decision being made during the recent term at Knoxville, that when a bill is filed under the Code, section 4282, to subject the property of a defendant, which cannot

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be reached by execution, to the satisfaction of a judgment, the Court of Chancery will have cognizance, although the judgment debt be under fifty dollars, that Court having "exclusive jurisdiction" in such cases. The reason is, that it is the peculiar subject of jurisdiction, the enforcement of a positive equity, not the amount involved which must be looked to, there being no other mode of redress. Whether a case, like the one before us, would fall within the principle of these rulings, it would be improper for us to say.

The judgment of the Circuit Court must be reversed, and a judgment rendered here in favor of the plaintiff against the defendant for the amount found to be due, with costs, for which the plaintiffs will have execution as in other cases.

FREEMAN, J., delivered the following dissenting opinion :

This is a suit commenced before a Justice of the Peace for Davidson County by warrant, to enforce the lien for taxes due for the years 1867, 1874, 1876, and 1878. The warrant states the cause of action to be the taxes due for the years mentioned, makes an exhibit from the tax books of the sums due, including costs of every kind properly chargeable, with the property on which they are chargeable, that the sum is under fifty dollars, that a lien exists in favor of the State and County of Davidson on said property for the payment of

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the sums specified, and asks that the same be enforced, free from the equity of redemption, unless the defendant will pay the amount by a short day.

The questions are the jurisdiction of the justice of the peace in such a case to enforce a lien on real estate, and the mode of procedure should the jurisdiction be sustained.

We have settled at this term, in the case of the *State v. Duncan*, that the lien created by our law in favor of taxes on real estate, might be enforced by a court of equity as other liens are enforced in these courts. But Courts of Chancery in this State, by statute, have no jurisdiction where the sum in dispute appears to be less than fifty dollars, as in this case. The lien exists as much in such case as where the sum due is larger, but the jurisdiction of the Court of Chancery is limited by this sum.

The question then, in this case, is whether we have an equitable right which has no remedy for its enforcement under our system by suit, or whether in cases of taxes in amount less than fifty dollars, the State and county are confined to the process of sale, as has been the usual practice, and which is known to have heretofore proven ineffectual, while in cases where the sum is over fifty dollars, the equitable remedy is held to exist. It would seem clear, that if there is equitable jurisdiction to be found in a court having cognizance of the sum, that court should be resorted to, so that the same measure of remedy should exist in the case of tax

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liens in the one case as in the other, much the larger number of cases being under fifty dollars. Justices of the peace have jurisdiction of the amount if they have equitable jurisdiction over the question. If such jurisdiction exists, it must be found in our statutory laws—such courts being, by immemorial usage, law courts, as well as by our general statutes conferring or regulating their jurisdiction.

Under the title, "Jurisdiction of justices of the peace," sec. 4123, sub-sec. 7, the jurisdiction of justices of the peace is summarized, and is declared to extend to, among other things, "*all equity causes where the subject matter does not exceed fifty dollars.*" By sec. 4124, "any justice of the peace, and any court of this State, before whom any cause may be pending, by appeal or otherwise, where the subject matter does not exceed fifty dollars, shall hear and determine such causes upon principles of equity, and render such judgment or decree as the merits of the case may require, as *fully*, and in the same *manner*, as courts of chancery."

There certainly can be no possible constitutional objection to conferring this jurisdiction on justices of the peace. The Legislature clearly had the power to give the jurisdiction. The only question is, has it been done?

It is evident the Act of 1857-8, from which these sections of the Code are taken, was designed to provide for all cases where there was an equitable right, but which could not be enforced in a

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court of equity because of the limit fixed for that court that the sum should be fifty dollars. The jurisdiction is "to all equity causes, where the sum is under fifty dollars." Is this an equitable cause? Unquestionably the enforcement of liens is an equity cause, in the sense of this statute, and as we have held at the present term, the enforcement of a lien for taxes on realty is an equity cause, or a case of equitable jurisdiction, which can be entertained in that court, it follows, the jurisdiction is conferred by this statute, unless excluded by the provisions of some other section of the Code, or by necessary implication from it. No such exception exists.

The argument is clearly untenable that sec. 4124 intended only that justices of the peace, in cases under fifty dollars, should simply do justice between the parties; that is, be free to administer a sort of natural equity in such cases. The language clearly expresses the idea that the remedy should be the remedy given in a court of chancery in like cases. They "shall hear and determine such cause upon principles of equity, and render judgment or decree as the merits of the case may demand, in the same manner as courts of chancery," is the language. Such is evidently the meaning of the language used, and is also the view taken of it in the only case where it has been before this court: *Williams v. Willhite*, 8 Head, 344.

This jurisdiction, as will be seen, is not conferred alone on justices of the peace, but is given

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to justices of the peace and any other court of this State before whom a cause is pending, whether by appeal or otherwise. So that the Circuit Court would be required to administer the equitable remedy, in a proper case, as well as the justice's court.

The jurisdiction being conferred, how shall it be exercised? The section says it shall be determined on principles of equity, and the court or justice is to render such judgment or decree as the merits of the case require, as fully, and in the same manner, as a court of chancery. While the result thus required may apparently be not in accord with our notions of the ordinary proceedings before such courts, there is in fact nothing strange or startling in it. It simply requires a court to make the proper decree to enforce a right, where no other jurisdiction to enforce it exists. That decree must be the same that a court of chancery would render in a like case. The decree in this case would be that the party has a lien on the lands, that the defendant must pay the money by a time to be fixed, and if he failed, his land should be sold, after notice as required by law in other cases of sales under a decree of a court of chancery.

As to who shall execute this decree, we would say it is in the nature of an execution, and should be executed by the officer serving the process, or some other officer of the county to whom the execution might be issued. He should make return and report of the sale, and the same entered, as

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confirmed by the justice, and title divested and vested, as a court of chancery would do. The registration of this decree—or it may be a copy of the whole proceeding, the decree, however, is sufficient,—would be a muniment of title, and would be in conformity to the practice in chancery cases.

As to the policy of all this, we have nothing to say, but as to the legality of it, we can see no objection to it, nor even why in the class of cases provided for, it is not a very proper jurisdiction to be exercised. If the case is appealed to the Circuit Court, that Court would enter the proper decree and have it executed by its appropriate officer, the clerk, and so end the case.

This is my view of the law of this case, a majority of my brethren hold that you can allow a justice only to render a judgment for the amount due, issue execution, and have it collected, as in other cases by execution.

Let us test the correctness of this by the language of the Code, and by the reason of the thing.

This is a question of construction of statutes. All concede that the meaning of the Legislature is the law. This meaning is to be ascertained from the language used, with such light thrown on this as can be had from a knowledge of the evil to be remedied. We look at the latter means first. The evil was, that there was a class of cases where a party had a right such as could be enforced, from its nature, by the principles of a court of equity. But that court was limited in the exercise

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of its jurisdiction to sums of fifty dollars or over. It was intended to furnish a remedy in such cases, and give courts that already had jurisdiction under this sum to give the relief which a court of equity could give on the right, if the sum had been sufficient. That this is the purpose of the statute, we take it, no one can seriously doubt, when we look at the facts stated, and then at the language used. We need go no further back at present than the Code. It contains the former statutes conferring this jurisdiction, revised by the compilers, and re-enacted by the Legislature. It may be stated that the old Act of 1817, we believe is its date, had given jurisdiction to inquire into the consideration of sealed instruments, and decide such cases on principles of equity. The Act of 1857 amended this statute by the language found in the Code. We look to the sections of the Code embodying these statutes and re-enacting them. In the summary of jurisdiction of justices of the peace, Code, sec. 4123, jurisdiction is given in, among other cases, all equity cases where the subject matter (not the sum due) does not exceed fifty dollars. Thus it is clear where the subject matter is under fifty dollars the justice has jurisdiction of equity causes. He had jurisdiction of all sums to render judgment for or against the one party or the other, before these statutes. Section 4124 then defines this jurisdiction, and is: "Any justice of the peace, and any court of this State, before

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whom any cause may be pending, by appeal or otherwise, where the subject matter does not exceed fifty dollars, shall hear and determine such cause upon principles of equity, and render such judgment or decree as the merits of the case may require, as fully, and in the same manner, as courts of chancery."

Is this an equity cause, and the subject matter less than fifty dollars? If so, the statute gives the mode of proceeding in such a case, and tells plainly what the right of the party is—to have the cause determined on principles of equity; that is, as a court of equity, and not as a justice would have done before on the rules of the common law. It could not be seriously maintained that equity here means simply on the natural justice of the case, for this would be to give no rule, but leave the measure of much justice as variable as the notions of the magistrate, or even as uncertain, as the well known illustration, the length of his foot.

When it is determined, however, what is the procedure? He is to decide the case on its merits, guided by equitable rules instead of legal rules, and then render a judgment for or against the one party or the other, as legal right shall be, or if the case demand it, shall render a decree on the merits of the case, as fully, that is as completely, and in the same manner as a court of chancery.

The majority hold he shall do no such thing, but only render a judgment for the debt, and issue an execution. If this is not a repeal of the

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statute by this Court, I am unable to understand what would be.

The test of the question is, to formulate the principle of their holding, and then give the language of the Code. If they are contradictory the one to the other, then they cannot stand together, and one or the other must go down. Which ought to yield, I had always thought a question beyond the need of argument. The enactment of the law-making power, I had always understood, was imperative and controlling on the courts, and could only be stricken down by being found in violation of the Constitution.

Let us apply the test suggested. The holding is, that in an equity cause, where there is a right by the well known principles of equity, there shall be a simple judgment in favor of the plaintiff for his debt, and execution.

The statute says you shall render such judgment or *decree* as the merits of the case require, as fully and in the same manner as a court of chancery. Who makes the rule in this case, the Court or the Legislature?

The case is a case of a lien on real estate to discharge a debt for taxes. A judgment for the plaintiff is no more than he has before, or its equivalent, for the tax book is that, and you give him no more.

We have held at this term, in the Duncan case, that on precisely this state of facts, the decree to

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be rendered by the court of chancery is, that the land be sold and proceeds applied to the sum due, and which was a lien on the land.

The Code says you should render such a decree as a court of chancery should give—a decree “on the merits, as *fully* and in the same manner as courts of chancery.” Does the holding of the majority do this? This is what the facts required. If in a court of chancery, it is what would have been decreed. Why shall not the party have it here? The jurisdiction in equity causes is given to the justice, but the holding is that he cannot exercise it. The requirement is a decree in the same manner a court of chancery would decree. The holding is, this cannot be. For what reason, I am unable to see, except that it is not thought good policy, or this view, if acted on, we would have our hands full in this Court, or to hold the Legislature to the best policy, in addition to conformity to the Constitutions, State and Federal. This holding simply repeals the jurisdiction in equity cases conferred by the statute in our State, for who can point out a case where the justice can exercise it, unless he can render a decree “in the same manner as a court of chancery” on all demands for money, to the extent of his jurisdiction? He can by other statutes give a simple judgment. He cannot now render a decree in cases under fifty dollars, and a simple judgment will not enforce equity jurisdiction or the rights acknowledged by the principles of equity.

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Believing the holding simply repeals a statute of the State, and substitutes in its stead a rule prescribed by this Court, I dissent earnestly but respectfully from the opinion of the majority.

**R. McP. SMITH v. MAYOR AND CITY COUNCIL OF
NASHVILLE.**

CORPORATION, MUNICIPAL. *Power to employ counsel.* A municipal corporation has no such interest in a suit exclusively directed against its officers as will authorize it to retain counsel for its defense, although the bill may enjoin the officers from performing the functions of their office, and ask for the appointment of a receiver with power to control the corporate property and finances.

FROM DAVIDSON.

Appeal in error from the Circuit Court of Davidson County. **NATHANIEL BAXTER, J.**

R. McP. SMITH for Smith.

W. K. McALISTER, for City of Nashville.

COOPER, J., delivered the opinion of the Court.

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Action for professional services, as a lawyer claimed to have been rendered by the plaintiff for the defendant. The declaration is in the form of the common counts, and the material plea *nil debit*. The Circuit Judge, who tried the case without a jury, rendered judgment in favor of the defendant, and the plaintiff appealed in error.

The services for which a recovery is demanded were rendered in defending a suit commenced by a bill filed on the 3rd of June, 1869, in the Chancery Court at Nashville. The bill was brought in the name of the State, on the relation of a large number of the citizens of Nashville, against the Mayor and Common Council of Nashville, the Mayor of the city, the individuals composing the City Council, the Treasurer, Collector and Recorder, and other persons named. The bill called in question the right of the Mayor and a number of the members of the City Council to hold the offices occupied by them, because of the want of the necessary qualifications. It charged all of the officers with the grossest malfeasance in office, and with having brought the corporation to the verge of bankruptcy. The object of the bill was to enjoin the city officials made defendants from issuing, receiving, using or speculating in city warrants, alleged to have been fraudulently executed, until their validity could be enquired into, and to call the same officers to account for money made by speculating in the means and credit of the city. There was also a prayer for a receiver to be ap-

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pointed to control the finances of the city, and save it from ruin. The bill also asked that certain third persons, who were made defendants, as large dealers in the warrants of the city, and in collusion with the city officials, be enjoined from using in any way, or suing on, or selling the checks or warrants in their hands.

Upon this bill, one of the Chancellors of the State granted a fiat for injunctions as prayed. Afterwards an amended and supplemental bill was filed, docketed as a separate suit, which is not made a part of the bill of exceptions, but under which a receiver was appointed in conformity with the prayer of the original bill. On the 5th of June, 1869, the plaintiff was retained by the Mayor of the city to assist the City Attorney and other counsel in the original case. On the 23rd of September, 1869, the Mayor and City Council of Nashville undertook to ratify the act of the Mayor in employing attorneys and solicitors to defend the two bills, referring to them by their title and numbers on the rule docket of the court.

The Circuit Judge, on the trial, found as a fact that the plaintiff was retained by the Mayor to defend the suit, and that this retainer was subsequently ratified by the City Council. He further found that the plaintiff, in pursuance of the retainer, performed services which were reasonably worth the amount sought to be recovered. But he also found as a fact that, although the corporation was made a nominal defendant to the bill,

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no relief was sought against it, and that it had no interest in defending the bill. That the only object of the bill was to prevent the other defendants from injuring the corporation, and that these defendants, as individuals, were the only defendants against whom relief was sought, or who had any interest in defending the bill. He was of opinion that the defendants, neither as individuals nor as Mayor and City Council of the city, had any power to bind the corporation to pay for the legal services rendered in defense of the suit. He found, he says, "as well the issues of fact as of law" in favor of the defendant.

Where a municipal corporation has no interest in the event of a suit, or in the question involved in the case, it would seem clear that it could not assume the defense of the suit, or appropriate its money for the payment of the expenses incurred. "It would be a dangerous power," says Pratt, J., "to be vested in municipal corporations which would give them the right to employ counsel and defend every suit which might present a question in the decision of which the agents of such corporations might fancy themselves interested: *Halstead v. Mayor of New York*, 3 N. Y., 430, 435. Most clearly the corporation could not appropriate money to defray the costs of an official who had been prosecuted for official misconduct, although he be acquitted: *People v. Lawrence*, 6 Hill, 244; *Merrill v. Plainfield*, 45 N. H., 126; *Butler v. Milwaukee*, 15 Wis., 493. Nor to defray the expense

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of a civil action for like official misconduct. A retainer for the prosecution or defense of any suit in which the corporation is not directly interested would be of no avail to create a corporate liability: *Daniel v. Mayor of Memphis*, 11 Hum., 582.

These principles are not controverted by the plaintiff in error, but he earnestly and ably argues that he was retained for the city, and that his services were rendered in protection of the privileges and franchises of the municipality whose corporate autonomy was threatened. But the Circuit Judge found as a fact that no relief was sought against the corporation, whose rights would not have been in the least affected by a *pro confesso* order taking the bill for confessed as against it.

The finding of a fact by the Circuit Judge in a case tried by him is as conclusive in this Court as a similar finding by the jury. And if we look for ourselves to the only bill which was introduced in evidence before him, there cannot be a doubt of the correctness of his conclusion. Its sole object was to restrain the alleged illegal and fraudulent disposition of the corporate funds by the individual defendants. If the officers of a municipal corporation depart from their sphere of duty, and assume to themselves a power over the corporate property which the law does not confer, and a *fortiori* if they are fraudulently appropriating the corporate funds to their own benefit, a Court of Chancery no longer looks upon them as acting under the authority of their office, but treats them merely as

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persons wrongfully dealing with property entrusted to them, and interferes by injunction and other process: *Frewin v. Lewis*, 4 M. and C., 249, 255; *Baltimore v. Horn*, 26 Md., 194; *Paterson v. Bowers*, 4 Grant, 170. The plaintiff in error thinks that the Circuit Judge looked too much to the first bill, and did not sufficiently consider the second bill, in which, he says, the "great bulk of the services were performed," and "the contest over the receivership actually waged." But he concedes that the second bill "was rather an amended bill." If so, the issues must be considered substantially the same, unless the contrary appears, and the contrary does not appear, for the bill is not introduced in evidence. And any defects of the original bill may have been cured by its averments. Besides, the plaintiff's retainer by the Mayor was only in the first suit, and the subsequent ratification by the City Council was of "the action of the Mayor in the employment of attorneys," and no other employment is shown. The answers of the defendants which appear in the bill of exceptions, it is admitted by the plaintiff, were never filed, and therefore go for nothing except to show the character of the work done. And the same is true of the petition for a supersedeas to one of the Judges of the Supreme Court to supersede the Chancellor's orders and the argument therewith submitted. They cannot be looked to for facts in support of the plaintiff's case except to show the character of his work.

There is no error in the judgment, and it must be affirmed.

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4L	76
11L	89
15L	198
4pi	168

AUGUSTA MANUFACTURING COMPANY v. W. M. VERTREES.

1. **CORPORATION. *Franchises. User.*** Very slight circumstances are sufficient to show user of franchises under a charter of incorporation, and a consequent organization of the corporation.
2. **PRACTICE AND PLEADINGS. *Ejectment.*** In an action of ejectment it would be a good defense, under the plea of not guilty, that the plaintiff, who sued as a foreign corporation, was not in fact a corporation.
3. **PRACTICE. *Charge of court. Evidence of incorporation.*** Upon the question of the incorporation of a company, it is error to charge that the mere execution of a deed to the company by one party, and of a new deed in confirmation by the devisee of that party, would not be sufficient proof of user of franchises to establish the incorporation. The jury should have been left to draw their own inference.
4. **SAME. *Same. Declaration. New Count.*** It is error to charge that under the present mode of proceeding in ejectment, a person in whose name a new count is filed becomes a substantive and distinct party, whose recovery would be antagonistic to the rights of the original plaintiff.
5. **SAME. *Same. Same. Amendment. Statute of Limitation.*** If there be privity between the plaintiff and a new party in ejectment, as where the relation exists of vendor and vendee, an amendment of the declaration by the addition of a count in the name of such party, would relate back to the commencement of the suit so as to obviate the bar of the statute of limitations.

FROM DAVIDSON.

Appeal in error from the Circuit Court of
Davidson County. N. BAXTER, J.

M. ALLEN and N. S. BROWN, for plaintiff.

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S. WATSON, for defendant.

COOPER, J., delivered the opinion of the Court.

Action of ejectment, in which the verdict and judgment were for the defendant, and the plaintiff appealed in error.

The plaintiff sues as a corporation chartered by the Legislature of the State of Georgia. It introduced in evidence the charter or act of incorporation passed on the 27th of December, 1845, which appoints certain persons named a board of commissioners to open a book of subscription for shares in a manufacturing company, the commissioners to require from the subscribers a payment of not less than five nor more than ten per cent. of the amount subscribed. By the third section of the act, "the subscribers or stockholders in said company shall be, and they are hereby declared to be a body corporate and politic under the name and style of the Augusta Manufacturing Company." The plaintiff further introduced as evidence a deed executed to it by R. H. Brockway, acknowledged by him on the 16th of July, 1858, and registered the next day, purporting to convey a lot in the town of Edgefield, which it claims covers the land sued for. It also introduced evidence tending to prove that this conveyance was made in consideration of a debt due to it by Brockway for goods manufactured by it as a corporation, and other testimony tending to show that at the date of the deed it had an agent in Nashville for the transaction of

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its business as a foreign manufacturing company. Upon this state of facts, the Court charged the jury as follows: "To enable the plaintiff to hold property, or maintain an action, it is necessary that the proof should show that the stockholders, by an acceptance of the charter, became a corporation. The fact of acceptance is susceptible of being proved by direct proof, such as a resolution 'by the stockholders expressly accepting, or by proof that they have been in the habit of using and exercising the privileges and franchises granted by the charter, or that they have been recognized as a corporation by the Legislature of Georgia or of this State. But if there is no other proof of the plaintiff's corporate existence except its charter, that has been read, and the deeds which have been read in evidence of title in this case, and the fact of bringing this suit in the name of the Augusta Manufacturing Company, these facts alone are not sufficient to prove the plaintiff's corporate existence, or right to sue or hold property."

The errors assigned on this charge are that there was no plea calling in question the plaintiff's corporate existence, that the charter incorporated the company directly, that the facts stated by the Court as not sufficient to establish the corporate existence should have been left to the jury to pronounce on their sufficiency, and that the evidence clearly showed a user.

The Code, sec. 3239, provides that the defendant may plead not guilty to an action of ejectment,

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"and upon such plea may avail himself of all legal defenses." It would be a good defense to such an action brought by a plaintiff as a foreign corporation, that the plaintiff was not a corporation. While the rule in other actions may be different, the statute allows the defense in this action under the general issue.

The act of the Legislature of Georgia, offered in evidence, does not directly incorporate the persons named as a body politic and corporate. It appoints commissioners to open a book for the subscription of stock, and incorporates the subscribers. It was therefore necessary to show acceptance of the charter by user or otherwise. Very slight circumstances of user are required in such cases: *Gleaves v. Brick Church Turnpike*, 1 Sneed, 491. It was error to charge that the mere execution of a deed to the company by one party, and of a new deed in confirmation by the devisee of that party, and the bringing of an action of ejectment thereon, would not be sufficient proof of user of manufacturing franchises to establish the incorporation. These facts should have been left to the jury to draw their own inference. And there was other proof tending to show an organization of the corporation.

An important question of controversy in the court below was whether the deed from Brockway, under which the plaintiff claimed, covered the land in dispute. Brockway originally owned a parcel of land in the town of Edgefield, in the form of a

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parallelogram, 568 feet in length from east to west, and 170 feet wide from north to south. It was laid off into lots fronting north on the Gallatin turnpike, afterwards known as Main street, running back to an alley. The land was bounded on the east by Minnick street, and on the west by Tulip street. Each of the lots beginning at Minnick street fronted fifty feet on Main street, except the most westerly lot on the corner of Tulip and Main streets, which had a front of sixty-eight feet, and all had a depth of 170 feet. The proof leaves no doubt that Brockway sold to the plaintiff the lot on the corner of Main and Tulip streets, but the boundaries in his deed of conveyance tend to locate it at the other corner. The deed conveys "a tract of land in the town of Edgefield, Davidson county, Tennessee, as follows: Beginning at a stake the southwestern junction of Minnick street and the Gallatin turnpike road, thence running along said turnpike sixty-eight feet to a stake; thence at right angles with said turnpike road, and parallel with Minnick street, 170 feet to an alley; thence parallel with said alley, running towards Minnick street, sixty-eight feet; thence along said Minnick street, towards said turnpike road, 170 feet to the beginning." At the date of this conveyance, Brockway had sold and conveyed to a third person the lot on the southwestern corner of Minnick and Main streets. He still owned the lot on the corner of Tulip and Main streets, the size of which exactly corresponds with the size of the lot de-

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scribed in his deed to the plaintiff, and there is proof tending to show that he put the agent of the plaintiff in possession of this lot under the deed. Brockway died in 1862, having by will devised all of his real estate to Elizabeth A. Brockway, his wife. On the 25th of March, 1872, she, by deed of that date, reciting the sale and conveyance by her husband to the plaintiff, and the mistakes which had been made in the locative calls therein, undertook, in consideration of the original payment to the husband, to relinquish, quit claim and convey to the plaintiff, by its true boundaries, the lot intended to have been conveyed.

The real defendant in this case claims the lot in controversy, being a part of the lot 68 by 170 feet on the corner of Tulip and Main streets, under a deed made on the 21st of July, 1860, by third persons having, so far as appears, no title. The defendant went into possession about the date of this deed, and has been in possession ever since.

This suit was commenced on the 15th of May, 1872, the declaration averring title in the plaintiff. On the 15th of April, 1874, the plaintiff, by leave of the Court, added a count to the declaration in the name of Elizabeth A. Brockway, to which the defendant pleaded not guilty.

The defense made to the title under the original conveyance from Brockway was, that the calls of the deed did not cover the land in dispute. The defense to the confirmatory deed of Brockway's devisee was, that it was void for champerty by reason

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of the defendant's adverse possession at the time. And the defense to the new count in the name of the devisee rested on the ground that it was a new action, and barred by the statute of limitations.

Upon the first point the Court charged: "It is conceded that the lot described in the original deed is separated from the lot of which defendant is in possession by several intervening lots, and constitutes no part or parcel thereof. This being so, the plaintiff cannot recover upon this deed."

On the second point he said: "If you should find from the testimony that the defendant, either by himself or agents, was in the adverse possession of said lot at the date of the deed of the devisee, the deed is champertous and void, and no recovery can be had upon it."

On the third point he said: "I am of opinion that since the abolition of the old action of ejectment, and the adoption of the present mode of proceeding to recover the possession of land, Mrs. Brockway is to be considered a substantive and distinct party to this record, and if you find for the plaintiff upon her title, the verdict must be for her, and against the Augusta Manufacturing Company. She is a new party to the action, suing in her own right and for her own benefit, and any defense may be made to her title that could have been made if she had commenced a separate action in her own name on the day she became a party to the declaration. And if the defendant had had

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the peaceable possession of the lot for seven years on that day, the 18th of April, 1874, such possession would be a bar to the action, and your verdict will be for the defendant."

The charge says it was conceded that the lot described in Brockway's deed was separated from the lot sued for by several intervening lots. In view of this concession, error can scarcely be assigned on that part of the charge. Boundary in ejectment is a question for a jury upon a proper charge. Whether, notwithstanding the language of the deed, the jury could, upon a proper charge, have found the lot in controversy to be within its boundaries, by the rejection of words of erroneous description, in view of the actual delivery of the lot to the plaintiff under the deed, would be a useless inquiry; *Hale v. Darter*, 10 Hum., 92, 94; *Person v. Roundtree*, 1 Hayw., 378; *Winchester v. Gleaves*, 1 Tenn., 218; *White v. Hembree*, 1 Tenn., 529; *Henderson v. Long*, Cooke, 128; *Funa v. Manning*, 11 Hum., 311; *Fancher v. DeMontegre*, 1 Head, 40; *Cherry v. Slade*, 1 Murphy, 82; *Barclay v. Howell*, 6 Pet., 498.

Treating the deed of Elizabeth A. Brockway as a new and independent conveyance, the Judge's charge on the second point would be good law. But if it be treated as a conveyance in fulfillment of a previous *bona fide* contract, evidenced by the previous deed, rendered ineffective by reason of its misdescription, and entered into before the adverse possession commenced, it would not be within the

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operation of the statute of champerty: *Whitesides v. Martin*, 7 Yer., 384; *Sims v. Cross*, 10 Yer., 460; *Hale v. Darter*, 10 Hum., 92; *McCoy v. Wiliford*, 2 Swan, 644. So, if it be considered as a deed of confirmation, as it may be, notwithstanding the words of positive grant (Co. Lit. 301, *b.*) although the plaintiff took no estate in the land under the original deed, it would not be void for champerty: *Crockett v. Campbell*, 2 Hum., 411; *Simmons v. McKissick*, 6 Hum., 259. These points must, in the attitude in which the case is now before us, be left undecided.

But His Honor clearly erred in his charge on the third point. Under the old action of ejectment which prevailed in this State prior to the Act of 1852, brought into the Code, sec. 3230 *et. seq.*, there can be no doubt that the lessor of the plaintiff could add a new count to the declaration in the name of a third party. His Honor is of opinion that this rule has been abolished by the new mode of proceeding. In this he is clearly in error. The Code, sec. 3236, expressly recognizes the continuance of the old rule, and authorizes the filing of separate counts in the name of several parties. The old practice still prevails under the new form. Formerly, the plaintiff, whose deed was void for champerty, might add a count in the name of his grantor, in order to have the benefit of the title he had bought: *Wilson v. Nance*, 11 Hum. 190. The same practice was sanctioned by this Court, under the Code, during the last term at Knoxville.

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If there were no privity between the plaintiff and the new party, the additional count would be treated, for all purposes of defense, as the commencement of a new suit as of the date of its filing: *Corder v. Dolin*. 4 Bax., 240. If there were privity, as in the case of grantor and grantee, where the deed was void for champerty, it was held under the old practice that the amendment would relate back to the commencement of the suit, and place the rights of the parties on the same ground as if it had been originally incorporated in the writ and declaration: *Nance v. Thompson*, 1 Sneed, 321. The reason was, as stated in that case, that no new right or title is set up. "It is rather," says the Judge, "a different statement of the same cause of action or right of recovery, adapted to a different state of proof. The plaintiff merely seeks, in aid of his right to use the name of his vendor as he has the right to do, and to draw to the equitable title in himself the mere dry legal title remaining in the vendor with which it was attempted ineffectually to vest him." This is equally true of the equitable title of the vendee whose deed by mistake does not convey the land intended. The only difference between the old practice and the new is, that under the Code the vendee cannot use the vendor's name as of right, but must obtain his consent.

For the errors stated, the judgment must be reversed and the cause remanded for a new trial.

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WILLIAM GREER v. THOMAS AND MOSES WHITFIELD.

1. **PRACTICE AND PLEADING.** *Prosecution bond. Rule to justify or give new security.* After a Circuit Judge has once entertained an application for the enlargement of the penalty of a prosecution bond and accepted the sureties, he cannot be required to make a rule upon the plaintiff to justify or give new security upon affidavits stating no new facts, where the penalty of the bond is sufficient to cover the costs and damages which may be awarded.
1. **CHANGE OF VENUE.** *Courts of same jurisdiction. Judge should select.* Upon a change of venue, if there are two courts of the same jurisdiction in the county to which the venue is changed, the Judge ordering the change must select the court to which the transfer shall be made, and his action cannot be revised in the absence of anything showing an abuse of discretion.
3. **MALICIOUS PROSECUTION.** *Evidence. Malice.* In an action for malicious prosecution, the defendant is entitled to testify as to his belief of the guilt of the plaintiff when he commenced the prosecution against him, and that he instituted the prosecution without malice.
4. **SAME.** *Probable cause.* In an action for malicious prosecution, it is error to charge the jury that the law would infer malice from the absence of probable cause.

FROM DAVIDSON.

Appeal in error from the Law Court of Davidson County. Jo. C. GUILD, J.

JOHN A. CAMPBELL and N. S. BROWN, for Greer.

JOHN E. & A. E. GARNER and CLAY ROBERTS,
for Whitfield.

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COOPER, J., delivered the opinion of the Court.

Thomas Whitfield and Moses Whitfield each brought a separate action against William Greer for malicious prosecution. The two cases were tried at the same time, by the same jury, and on the same evidence, by consent of parties, but as separate suits, and the jury returned a several verdict in favor of each plaintiff against the defendant for a different amount of damages. From the judgments rendered by the Court on these verdicts the defendant appealed in error

In October, 1870, the plaintiff in error was robbed of a considerable sum of money. A few weeks thereafter, and after consulting counsel, he caused one William Whitfield and his three sons, William, Thomas and Moses, to be arrested and brought before a justice of the peace, who, after hearing the evidence, bound the elder Whitfield to appear at court, and the sons were discharged.

Indictments were subsequently found by the grand jury, plaintiff in error being the prosecutor, against William Whitfield and Thomas Whitfield for the robbery, upon which they were tried and acquitted, and the plaintiff in error was, by the court, taxed with the costs. Thereupon, each of the four Whitfields commenced a separate suit against Greer for malicious prosecution.

The venue was changed at the instance of the defendant to the county of Davidson, in which there were two courts of concurrent jurisdiction,

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the Circuit Court and the Law Court. The defendant desired the transfer to be made to the Circuit Court, but the presiding Judge, over the defendant's objection, made the transfer to the Law Court. It was agreed that the causes should be tried at the same time, but after a jury was obtained, though not sworn, William Whitfield, Sr., and William Whitfield, Jr., dismissed their suits. The other cases were tried, with the result stated.

It seems that each of the suits was commenced upon a prosecution bond in the penalty of \$125, but the penalty was afterwards increased by the order of the Court to \$200. Pending the delay previous to the trial, the defendant below made repeated and unsuccessful efforts to induce the Circuit Judge to further increase the penalty of the prosecution bonds, and to compel the plaintiffs to give additional security. The defendant excepted to these refusals of the Court to entertain his motion, and on one occasion took a bill of exceptions embodying his affidavit and the action of the Court. He now assigns the ruling of the Court as error. The law undoubtedly requires every plaintiff who brings an action for malicious prosecution to give sufficient security for the payment of all costs and damages which may be awarded against him: Code secs. 3191, 3192. It also provides that such a plaintiff may, at any stage of the cause, be ruled to justify or give new security on sufficient cause shown: Code, sec. 3191. The Circuit Judge had, however, previous to the application in question,

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required new bonds with the penalty increased, which were given and accepted. The affidavit offered, while very positive in its expressions of opinion, does not show any change of circumstances or new facts which required the Court to go behind its previous action. Nothing is better settled in legal practice than that an order once made, or action taken upon full deliberation will not, as a general rule, be interfered with except from a change of circumstances or new fact supervening, and this for the obvious reason that the whole time of the Court might otherwise be taken up with motions repeated *ad infinitum*, if counsel chose to be contrary or persistent. The Judge seems to have satisfied himself that the penalty of the bonds already taken was sufficient to meet the costs up to that term when the defendant ought to have been ready for trial. We cannot see that there has been any such abuse of the discretion which the law gives him as to call for revision by this Court, especially in view of the fact that the costs thus far, either by reason of his repeated continuances or by the result of the trial, have, so far as the defendants in error now before us are concerned, fallen upon the plaintiff in error.

Upon a change of venue, the law requires that the cause shall be transferred to the nearest adjoining county: Code, sec. 2839. The transfer is, of course, to a court of the same character and jurisdiction as the court in which the suit is pending. If there be two courts in the nearest county

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answering the description, it must necessarily be left to the Judge to direct to which court the transfer shall be made. Perhaps it would have been courteous on his part to have yielded to the wishes of the party at whose instance the change of venue was made, all other things being equal as they were in the eye of the law. Yet the matter was clearly in his discretion, and, in the absence of anything to show an abuse of that discretion, we cannot revise it.

The plaintiff in error was introduced as a witness, and, in the course of the examination in chief, was asked by his counsel: "If he prosecuted the plaintiffs with an honest belief of their guilt and without malice?" Upon objection taken by the defendants in error the Court refused to allow the question to be answered, to which ruling of the Court the plaintiff in error then excepted, and now assigns it as error.

To maintain this action, the plaintiff must show malice and the want of probable cause: *Kendrick v. Cypert*, 10 Hum., 291. The question is not whether the plaintiff was really guilty of the crime charged against him, but whether reasonable grounds existed for the defendant to believe him guilty: *Raulston v. Jackson*, 1 Sneed, 127. Probable cause is the existence of such facts and circumstances as would excite in a reasonable mind the belief that the person charged was guilty of the crime for which he was prosecuted. It is not sufficient that the party really believed that the crime had been

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committed by the person accused, when, in truth, the facts within his knowledge were insufficient to create the belief in the mind of a reasonable man: *Hall v. Hawkins*, 5 Hum., 357; *Winebiddle v. Porterfield*, 9 Pa. St., 139. Probable cause does not, therefore, depend on the actual state of the case in point of fact, but upon the honest and reasonable belief of the party prosecuting: *James v. Phelps*, 11 Ad. & El., 489; *Swain v. Trafford*, 4 Iredell, 389. Whether he did so believe or not is a fact to be found by the jury: *Turner v. Ambler*, 11 Jur., 346. His belief is a material issue of fact, as is also his malice; *Potter v. Scales*, 8 Cal., 220. Under the statute law, a party to an action is a competent witness except in actions or proceedings by or against executors, administrators or guardians, in which judgments may be rendered for or against them, and except also in the case of a husband or wife called to testify to facts which came to his or her knowledge by means of the marital relation: Code, sec. 3813d; *Patton v. Wilson*, 2 Lea, 101. Being a competent witness, he may, of course, testify to any material fact. The question is, therefore, directly raised by the assignment of error, whether the defendant below should have been allowed to answer the interrogatory put to him. The point comes before this Court for the first time, but it has been repeatedly presented, under the new rules of evidence, to the courts of some of our sister States.

In an action for malicious prosecution of the

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plaintiff for perjury, the defendant was asked whether at the time he made the complaint against the plaintiff he believed him guilty of the charge, the trial court excluded the evidence and the court of appeals reversed the judgment for this error. Another point made below was that the matter sworn to was immaterial. The defendant was also asked whether, at the time he made the complaint, he believed the evidence given by the plaintiff was material. The trial court excluded the testimony, and such exclusion was also held to be erroneous. "Both of these questions," say the Court, "tended directly to repel the imputation of malice, and perhaps, to some extent the want of probable cause. If answered in the affirmative, and reliance was placed upon the testimony by the jury, they would tend very much to exculpate the defendant; or, at all events, to mitigate the damages. How much weight the jury would give to such testimony was a question exclusively for them: *McKown v. Hunter*, 30 N. Y., 625. The same high Court has decided a number of cases involving the right of a party to depose to an intent or state of mind which seems fairly to establish the general principle that where the motive of the witness in performing a particular act or making a particular declaration becomes a material issue in a cause, or reflects an important light upon such issue, he may himself be sworn in regard to it, notwithstanding the difficulty of furnishing contradictory evidence, and notwithstanding the diminished credit to which his

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testimony may be entitled as coming from the mouth of an interested witness: *Seymour v. Wilson*, 4 Kernan, 567; *Griffin v. Marquardt*, 21 N. Y., 121; *Forbes v. Waller*, 25 N. Y., 430.

The same rule has been applied in a criminal case: *Kerrains v. People*, 60 N. Y., 221. The Supreme Court of Nebraska, in a case like the present, in which the law touching the defendant's belief is laid down precisely as in our cases, held that the defendant was entitled to testify in regard to his belief of the guilt of the plaintiff when he commenced the prosecution against him, and that he instituted the prosecution without malice: *Turner v. O'Brien*, 5 Neb., 542. No authority has been adduced in conflict with these rulings. The Court erred in excluding the testimony under consideration.

The Circuit Judge erred also in charging the jury that the law would infer that the prosecution was malicious from the absence of circumstances showing probable cause. And this for the obvious reason that to sustain the action there must be both malice and a want of probable cause. Malice may be inferred by the jury from the want of probable cause, but the law makes no such presumption. It is a mere inference of fact, which the jury may or may not make, and it should be left to them: *Johnson v. Chambers*, 10 Iredell, 287; *Mitchell v. Jenkins*, 5 B. & H., 588; *Newell v. Down*, 8 Blackf., 274; *Pharis v. Lambert*, 1 Sneed, 232.

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For these errors, without considering other points made, the judgment must be reversed, and the cause remanded for a new trial.

4L	98
11L	231
13L	304

R. L. SINGLETON, County Court Clerk, v. L. FRITSCH.

PRIVILEGE TAX. *Merchant Tailor.* The merchant tailor or his agent who sells by sample, taking measures and sending the clothing from another State, is liable to the privilege tax.

FROM BEDFORD.

Appeal in error from the Circuit Court of Bedford County. R. CANTRELL, J.

Attorney-General LEA, for Singleton.

T. B. IVIE, for Fritsch.

TURNER, J., delivered the opinion of the Court.

We adopt the opinion of Judge Robert Cantrell, the Circuit Judge, as the opinion of this Court.

"The agreed case submitted to the Court presents two questions: 1st. Is the defendant liable for a privilege tax for carrying on the business of selling

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clothing under the circumstances as set forth in the written agreement? 2nd. Had the officer who distrained the goods a right to sell them upon giving ten days' notice, or should he have given a non-resident notice through the newspapers?

"The first Act that has any particular bearing upon the question was passed in 1867-8, and is brought into the Code and is found in section 553a, sub-sec. 43, and reads as follows: "All peddlers of sewing machines, or selling by sample, shall pay a tax of \$10."

"The next Act bearing upon the questions at issue was passed on the 18th of January, 1870, chap. 45. The second section of said Act provides, "That hereafter merchants shall pay an *ad-valorem* tax upon the capital invested in their business equal to that levied upon all taxable property, and the term merchant, as used in this Act, indicates all persons or copartnerships engaged in trading or dealing in any kind of goods, wares and merchandise, either on land or at any steamboat, wharfboat, or other craft, stationed or plying in the waters of this State, and whether such goods, wares and merchandise be kept on hand for sale, or the same be purchased and delivered for profit as ordered; but nothing in this Act contained shall in anywise affect the collection of privilege taxes upon avocations declared by section 550 of the Code to be privileges, except the business of selling merchandise upon commission." Acts of 1870, pp. 58-9.

"The next Act that I find bearing upon the

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questions at issue was passed March 25th, 1873. Chapter 118, Acts of 1873, page 168, section 46 of said Act reads as follows: Be it further enacted, that the occupations and business transactions that shall be deemed privileges and be taxed, and not pursued or done without license, are the following, viz: Merchants, commission (wholesale or retail); * * * hucksters and sample sellers; * * * selling by sample."

"Under the provisions of the foregoing Acts there can be no doubt as to the liability of all persons engaged in the sale of merchandise to pay a privilege tax. But it is insisted that the Act of 1877, chap. 93, repeals so much of the law as applies to the occupation of selling goods by a merchant tailor where the suits are ordered by the consumers and the sale made by sample, and this presents the main question to be determined. In construing a statute, we must first examine into the old law and see what that was. Second, we must examine and see what mischief or injustice there was in the old law. Third, we must see what remedy was intended to be afforded by the new statute.

"We find that under the old law commercial agents, known as drummers, were taxed for the privilege of exhibiting samples and taking orders from the various merchants in the State to be filled by jobbers. The merchant received his goods, and before he could sell he had to pay an *ad-valorem* and privilege tax for the same goods, making a double tax upon the same goods. To remedy

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this real or apparent hardship, the Act of 1877 was passed, repealing so much of the Act of 1867-8 as taxed drummers, which Act is contained in section 553a, sub-sec. 43, of T. & S. Code.

"The term 'drummer' has acquired a common acceptation, and is applied to commercial agents who are travelling for wholesale merchants and supplying the retail trade with goods, or rather taking orders for goods to be shipped to the retail merchant, upon which merchandise the State collects her revenue. The merchant tailor who takes measures and supplies the citizen with clothing has never been known or recognized as a drummer, and the Legislature certainly never intended to release the merchant tailor from all tax provided he would take the measure of the citizen in this State and send the goods from another State. I am clearly of the opinion that was not the intention of the Act of 1877. I do not think that the Act of 1877 repealed the Act of 1870, chap. 45, and Act of 1873, chap. 118, or so much of said Acts as levy a tax on merchant tailors.

"I therefore hold that the action of the Clerk in issuing his distress warrant was fully authorized. I am also of opinion, and so hold, that sections 704, 705 and 706 of the Code fully warrant the Clerk and officer in the proceedings taken, and that the ten days' notice given by the constable for the sale of the goods was all that the law required.

"It is therefore adjudged by the Court that the

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law is clearly with the plaintiff, and that the defendant is liable for the tax claimed by the Clerk, Singleton."

W. L. McCLELLAND *et al.* v. J. W. DAVIS *et al.*

GUARDIAN AND WARD. *Security on guardian bond. Priority.* The recovery by infant wards of a decree against the personal representative of the deceased guardian for the amount due them to be paid *pro rata* with other claims, the estate being insolvent, will enure to the benefit of the sureties on the several guardian bonds in the order of liability fixed by law, and sureties secondarily liable may assert their priority of satisfaction against the assignee of a surety primarily liable, who takes with knowledge of the equity.

FROM GILES.

Appeal from the Chancery Court at Pulaski.
W. S. FLEMING, Ch.

I. N. BARNETT and G. T. HUGHES, for Complainants.

W. H. McCALLUM, for Defendants.

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COOPER, J., delivered the opinion of the Court.

In July, 1855, Henry J. Walker was appointed guardian of his three infant children, Sarah J., who afterwards intermarried with W. D. Smith, John W., and Tennessee Walker, and qualified by giving bond in the penalty of \$5000, with W. L. McClelland and George M. Brandon as his sureties. On the 7th of June, 1858, he renewed his bond as guardian, with J. W. Davis and George W. Walker as his sureties, in the penalty of \$6000. On the 28th of November, 1871, Henry J. Walker died, and S. G. Colvert was appointed and qualified as executor of his will. On the 11th of July, 1872, Colvert filed his bill against the children and devisees of his testator, suggesting that the personal assets of the estate would fall far short of paying the debts, and that it would be necessary to sell realty for the purpose, and asking that the administration of the estate be transferred to the Chancery Court. One main object of the bill was to ascertain, by proper account and decree, the indebtedness of the testator to his three children by reason of the guardianship as aforesaid. Such proceedings were had in this cause that, on the 3rd of November, 1874, a report was made and confirmed ascertaining the amount due from the estate to each of the wards, and a decree was rendered in favor of each ward against the complainant as executor, for the amount so found, with interest from the 1st of September, 1874, "which said sev-

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eral sums," says the decree, "will be paid *pro rata* out of the estate of the said Henry J. Walker, deceased, now being settled as an insolvent estate under the orders of this Court in this cause." By a subsequent decree, some credits for payments made by the executor were allowed, leaving the judgments in other respects in full force. Owing to litigation over some of the liabilities of the estate, only terminated by a decree of this Court at its present term, no dividend of the assets of Henry J. Walker's estate has yet been made, and the cause in which the judgments were rendered in favor of the children is still pending.

The children, not being content to wait the winding up of the estate of their father, brought their bill against Colvert, as executor, and the sureties on both of the guardian bonds, and took such proceedings that, on the 19th of November, 1875, they recovered a judgment for \$7,787.87 against the executor Colvert and the sureties on the two bonds, the sureties on the second bond being declared primarily liable to the extent of \$6,000, the penalty of the bond, and the sureties on the first bond declared liable for the excess of liability over that penalty, and to the extent of \$5,000, the penalty of their bond, for any amount that could not be made out of the sureties on the second bond. The whole amount of this recovery was collected under the decree, J. W. Davis, the surety on the second bond, paying about \$4,000, and the

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sureties on the first bond being compelled to pay the residue.

On the 18th of December, 1877, J. W. Davis filed a petition in the insolvent suit of Colvert against the Walker children, stating the fact of his suretyship, and that he had paid \$4,000 on the recovery had against him, and asking to be made a party defendant to that suit, and that his claim be allowed. On the same day he assigned his claim by reason of the payment to W. D. Smith, who a few days thereafter assigned the same to W. F. Stone in trust for the benefit of Smith's wife. Such proceedings were had under this petition that, on the 4th of March, 1878, a decree was rendered allowing the claim, directing it to be placed in the schedule of debts entitled to share *pro rata* in the assets of Walker's estate in that cause, and, reciting the transfers, authorizing the *pro rata* to be paid to Stone. None of the other sureties seem ever to have become parties to that suit.

On the 19th of August, 1878, the bill now before us was filed, by which, and the amended and supplemental bills subsequently filed, Davis, Smith, Stone and Colvert were made defendants, and the complainants, McClelland and Brandon, as the sureties on the first guardian bond, claim that they are entitled, by subrogation to the rights of the wards under the judgment rendered in their favor in the insolvent suit, for the amount found due to them from their guardian, to have the *pro rata* dividend which may be paid thereon by Walker's es-

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tate applied in satisfaction of the general indebtedness of the guardian to the wards, and, to that extent, in exoneration of their secondary liability as sureties on the first bond. Of this opinion was the Chancellor, who rendered a decree accordingly, and the defendants appealed.

If the original suit of Colvert, in which the liability of the guardian was ascertained, had made the sureties on both the bonds parties defendant, the proper decree would have been that the *pro rata* dividend of the estate should be applied in extinguishment of so much of the debt, that the sureties on the second bond should be primarily liable for the deficiency to the extent of \$6,000, and the sureties on the first bond only secondarily liable. If the dividend had paid the debt so as to reduce it below \$6,000, the latter sureties would have been *pro tanto* exonerated. The wards would, of course, have had the right to a decree at once against the sureties, without waiting for the dividend, but the decree would have declared the rights of the parties so as to have worked out the proper result by subrogation. As between the two sets of sureties, the first sureties were entitled to be subrogated to the rights of the wards to so much of their recovery as might be required to fully indemnify them. So, too, if the sureties had all made themselves parties to that suit after the rendition of the decree against them, or after the payment thereof, the Court would have adjusted the equities in the same way, although the new claims by reason

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of the judgment or the respective payments, might have been allowed against the estate: *Ewing v. Maury*, 1 South, L. J., 31.

The fact that the recovery of the wards against the sureties was by a separate bill, and that the two sets of sureties have proceeded differently to assert their rights against the estate, cannot change the result. No objection has been taken by the defendants to the more expensive mode of proceeding adopted by these complainants. They could have asserted their equity in the insolvent suit, and also in the suit in which the recovery was had against them, and no reason occurs why they cannot do the same thing by an independent bill, if the defendants raise no objection on that score. The equities of the parties are fixed by the decrees settling their relative liabilities precisely as if they had all been made in the same case, and the assignee of Davis can stand in no better attitude in relation to these equities than Davis himself. The assignees moreover are, so far as appears, mere volunteers, and at any rate are assignees with full knowledge of the complainants' equity.

There is no error in the decree, and it will be affirmed with costs. The costs below will be paid as ordered by the Chancellor.

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4L	108
9L	101
13L	488
4pt	506

EVELINA E. C. AIKEN v. GEORGE E. SUTTLE *et. al.*

1. **MARRIED WOMAN.** *Power of attorney of.* A married woman's power of attorney for the sale of her lands is invalid.
2. **SAME.** *Divorce, effect of.* The purchaser of the husband's interest in the wife's lands, prior to the Act of 1849-50, ch. 38, sec. 1, Code, sec. 2481, abridging the husband's power of disposition, took it as it then stood, and without reference to the contingency of a subsequent divorce at the wife's instance, which, therefore, had no effect upon the rights of such purchaser.
3. **STATUTE OF LIMITATIONS.** *Remainder.* The statute of limitations does not run against a remainder-man until, by the termination of the particular estate, the right of possession has accrued.
4. **CHANCERY JURISDICTION.** *Cloud on remainder.* A bill will lie to remove a cloud from a remainder in lands.
5. **SAME.** *Invalid sale, condition of avoidance.* Upon the avoidance of a sale of lands, where the purchaser has been guiltless of fraud or imposition, the holders of the lands under the sale, whether the original vendees or their successors in interest by descent or purchase, with or without warranty, are entitled to have the lands charged in their favor with a proper restitution of the purchase money paid upon the sale that is avoided.
6. **SAME.** *Same. Same. Amount of restitution* The amount of this restitution will be that of the purchase money paid upon this sale, with interest, but not exceeding (if the lands have been subsequently sold) the amount of the purchase money paid at the last sale (with or without warranty), with interest.
7. **CHANCERY PLEADING AND PRACTICE.** *Parties.* To a bill for the purpose of avoiding the sale of the lands, and of reclaiming them, in a case where there can be no account of rents and profits, only the holders of the lands at the time, under the sale, are necessary parties. The original or intermediate vendees with warranties of title are proper, but not necessary, parties.

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8. **STATEMENT.** *Application.* In 1846, 92 acres of certain lands, belonging jointly to complainant, then the wife of C. K. G., and her two brothers, were sold to J. B., and in 1847, 147 acres to R. C. S., complainant's interest being conveyed in each instance under a power of attorney executed by her husband and herself, with her privy examination. In 1857, J. B. conveyed his 92 acres to R. C. S. During that year complainant obtained a divorce *a vinculo* from C. K. G., for his fault, after which she married J. A. A., whose widow she now is. After the death of R. C. S., 100 acres of the 147 purchased by him in 1847 were sold (as included in a larger tract) under a decree in settlement of his estate, and purchased by L. D. S. The bill was filed in 1875 against the widow and the real representatives of R. C. S., and the widow and the personal and real representatives of L. D. S., to have said powers of attorney, and said conveyances thereunder, etc., annulled, as clouds upon complainant's title in remainder to an undivided one-third of the two tracts of 92 acres and 147 acres, and to have her rights in remainder declared. One-third of the purchase money paid by J. B. and by R. C. S., in 1846 and 1847, less C. K. G.'s life estate in this one-third, must be taken to have been paid on account of complainant's remainder in this portion of the lands. At the sale of the 92 acres by J. B. to R. C. S., in 1857, one-third of the purchase money, less the vendor's interest therein for the life of C. K. G., must be taken to have been paid on account of complainant's remainder in this tract. And, at the sale of the 100 acres to L. D. S. (as included in the larger tract), one-third of the purchase money applicable to the 100 acres, less the life interest therein as of that date, must be taken to have been paid on account of complainant's remainder in these 100 acres. The restitution to be charged in favor of the defendants as a lien upon complainant's interest in said lands, is what was paid on account of the remainder in 1846 and 1847, with interest, but the portion of this amount applicable to the 92 acres, and to the 100 acres of the 147, subsequently sold, not to exceed what was paid at the subsequent sales on account of the parts of the remainder involved therein, with interest from the dates of these sales respectively. And all of these sales being made without reference to any separate valuation of the life estate and the remainder, the former is to be determined, in every instance, upon the basis of the actual subsequent length of life of C. K. G.
9. **IMPROVEMENTS.** *Allowable when.* Improvements are allowable against the owner of lands, in favor of holders in good faith

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under color of title, from whom the lands are reclaimed, only as an offset against rents and profits. Where, as in the present case, there can be no claim for rents and profits, there can be no allowance on account of improvements.

FROM GILES.

Appeal from Chancery Court at Pulaski. W. S. FLEMING, Ch.

NOBLE SMITHSON and THOS. H. MALONE, for Complainants.

JOHN S. WILKES, for Defendants.

R. MCPHAIL SMITH, Sp. J., delivered the opinion of the Court.

In 1845, complainant, then the wife of C. K. Gillespie, being seized jointly with her two brothers, N. G. Taylor and A. M. C. Taylor, of a tract of land in Giles county, united with her husband in a power of attorney to her two brothers, authorizing them, or either of them if they could not act jointly, to sell and convey her undivided share of the tract; and in 1846, they, on their own behalf, and N. G. Taylor, acting on behalf of complainant and her husband, under this power of attorney, sold and conveyed to John Black, with warranty of title, 92 acres of the tract.

In 1847, complainant and her husband and A. M. C. Taylor executed a power of attorney to N. G. Taylor, authorizing him to sell and convey the interests of complainant and A. M. C. Taylor in

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the tract; and during that year, N. G. Taylor on his own behalf, and under this power of attorney, sold and conveyed another portion of the tract, containing 147 acres, to R. C. Suttle, also with warranty of title. Complainant was privily examined as to her execution of both powers of attorney.

In 1857, John Black conveyed the 92 acres he had purchased to R. C. Suttle, with warranty of title. After the death of R. C. Suttle, a tract of 508½ acres belonging to his estate, containing 100 acres of the tract of 147 acres purchased by him in 1847, as stated, was sold under a decree, in settlement of his estate, according to the provisions of his will, and purchased by L. D. Suttle, who dying in 1873, the tract passed to his heirs, subject to his widow's dower. The residue of this tract of 147 acres, together with the tract of 92 acres purchased of Black by R. C. Suttle, is held in common by the devisees of the latter, subject to his widow's dower.

The defendants are the widow and the real representatives of R. C. Suttle, and the widow and the real and personal representatives of L. D. Suttle.

In 1857, complainant, having lived with her husband for some twenty years, and borne him several children capable of inheriting, obtained a divorce from him upon the ground of his malicious desertion of her, the decree restoring to her all the rights of a *feme sole*. Afterwards she married

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John Alfred Aiken, whose widow she now is. C. K. Gillespie is still alive.

The bill, after setting forth these matters in minute detail, urges the invalidity as to complainant of these powers of attorney and conveyances, she having been a *feme covert* at the time of their execution, and prays to have them annulled, as a cloud upon her title in remainder, after the death of her former husband, C. K. Gillespie, to an undivided one-third of the lands conveyed.

The defendants concede the invalidity as to complainant of these instruments, but they insist that she had, at the commencement of this suit, in 1875, no interest in these lands, to have a cloud removed from. If her interest were conceded, there would be no controversy about the cloud. The case turns upon the question of her interest.

It is argued for the defendants that these instruments, invalid as to complainant, passed only her husband's interest, as husband and tenant by the courtesy initiate, in her share of the lands in question, and that his conveyees took his interest subject to be defeated by any of the contingencies that would have ended it in his hands if he had retained it, and, among others, by the termination of the coverture by a divorce at the wife's instance. That, therefore, upon the divorce, in 1857, complainant became entitled immediately to recover her share of these lands, just as if her husband had then died, and that not having sued until

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1875, she was then estopped by her laches and barred by the statute of limitations.

This consequence certainly happened if complainant was entitled to reclaim her interest in these lands immediately after the divorce in 1857. The question is, whether she *was* so entitled.

Many weighty authorities are cited in the affirmative of this question, and it is conceded by the counsel of complainant that it is the better view, if the matter were *res integra*. They point out that it is the view that was taken by complainant herself, who acted upon it in her suit against A. B. Worford, reported in 6 Cold., 632, in which, however, this Court held that the divorce in 1857 did not affect the interest of her husband's conveyees and their successors in interest in other lands similarly disposed of. They show also that complainant afterwards brought a second suit, in which, succumbing to the ruling of *Gillespie v. Worford* upon this point, success was sought through the supposed effect of the Act of 1849-50, chap. 36, sec. 1, but that the result was again adverse to the complainant, by the decision of this Court at Jackson, in 1871, the style of the case being *Aiken v. Mumford*, the opinion having been delivered by Judge Turney. They insist that while the only point expressly passed upon in this case was as to the effect of the Act of 1849-50, yet, as the decision could not have been adverse to her except upon the assumption of the correctness of the ruling in *Gillespie*

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v. *Worford* upon the point in question, therefore this must be taken to have been approved in *Aiken v. Mumford*, and they urge that complainant having been twice defeated by this ruling, is now entitled to invoke its protection.

For the defendant it is insisted, and this seems to have been the Chancellor's opinion, that *Aiken v. Mumford* is an authority only upon the one point expressly passed upon by the Court therein, and that *Gillespie v. Worford* is an isolated decision upon the point in question, which is glaringly erroneous, and ought to be overruled. Whether *Gillespie v. Worford* ought to be overruled upon this point, is what we have now to determine.

If the doctrine of this case be sound, that the rights of C. K. Gillespie's conveyees and their successors in interest in the lands of his wife were unaffected by the subsequent divorce decree, then, complainant's interest being only a remainder after the death of C. K. Gillespie, who is yet alive, she has been guilty of no laches, and is not barred. For, in this view, the statute of limitations could not run against her until after the termination of the particular estate by the death of C. K. Gillespie: *Miller v. Miller*, Meigs, 484; *McCorry v. King's Heirs*, 3 Hum., 267. She was not bound to sue until her right to possession should have accrued.

Nevertheless, at any time prior thereto, she might sue to have a cloud removed from her remainder interest, and to have her rights declared. A remainder-man is not obliged to wait until the right

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of possession has accrued, but may have a cloud removed during the existence of the particular estate: *Coleman v. Satterfield*, 2 Head, 259; *Dodd v. Benthall*, 4 Heis., 608; *Cantrell v. Davidson County*, 3 Tenn., Chan., 426.

In *Gillespie v. Worford*, it was conceded that the bill was properly filed, in so far as it sought only to have the deed set up by the defendant, as an assurance in fee, removed, as a cloud upon complainant's title after the termination of the estate by courtesy.

A remainder is a present right, though the enjoyment is future, and the owner may desire to dispose of it, or in some way to make it available to his needs, and he is entitled to have it relieved from a cloud impairing its value, and perhaps rendering it wholly unavailable.

In the inquiry as to the effect of a divorce a *vinculo*, for a cause arising after the marriage, upon the rights of a purchaser during the coverture of the husband's interest in the wife's realty prior to the Act of 1849-50, no material aid is to be derived from the common law authorities, because in England divorces a *vinculo* were granted only for causes sufficient by the ecclesiastical law to avoid the marriage *ab initio*. Where the supposed husband had aliened the lands of the supposed wife, and a divorce was afterwards obtained, it was thereby adjudged that there never had been any valid marriage, and of course the woman's rights remained unaffected by the abortive alienation.

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Divorces *a vinculo* for supervenient causes were introduced into this country by the legislation of the separate States. It lay, of course, with them, each one for itself, according to its views of sound policy, to determine for what causes such divorces should be granted, and also to regulate their consequences, both as to personal status and property rights.

Where the consequences were not expressly prescribed by legislation, they had, of course, to be determined according to the policy of the given State, as gathered from the legislation or otherwise; and where no rule could be thus deduced, then according to legal reason and analogy. Different views of policy might have been expected to obtain in different States. Our own legislation has, to some extent, regulated the consequences of such divorces. Code, secs. 2468, 2477.

Thus, where the divorce is obtained by the wife, the Court may decree her maintenance by the husband, or out of his property, real or personal, as it may think proper. If at the time of the divorce the wife has any property accrued by her own industry, or by gift, devise, descent, or distribution, she is to have this absolutely, subject, however, to the rights of creditors who became such during the coverture

If the divorce is obtained by the husband, his interest in the wife's lands is not to be affected thereby, and in case she survives him, she is not to be entitled to dower, nor is she to take any

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share of his personalty in the event of his intestacy; and in one case she is rendered incapable thereafter of alienating any of her lands.

In *Allen v. McCullough*, 2 Heis., 174, it was held that the effect of the provision protecting the rights of creditors was to keep the husband liable after the divorce for the wife's debts contracted *dum sola*, from which her death would have released him; and on page 188, Judge Nelson, who delivered the opinion of the Court, considered that the provision depriving the wife, divorced at her husband's instance, of dower and of a distributive share in the event of his intestacy, manifested that, in the view of the Legislature, she would, in the absence of such a provision, have remained entitled to these rights of a wife, notwithstanding the divorce.

In *Chunn v. Chunn*, Meigs, 187, the Court independently of legislation, upon granting a divorce *a vinculo*, had due regard to the rights of creditors; and in *McGhee v. McGhee*, 2 Sneed, 221, it was said that, independently of legislation, "upon well established general principles of law, the claims of the husband's *bona fide* creditors, or liabilities properly incurred in his behalf, existing prior to the application for divorce, must prevail over the rights of the wife." The property here was both real and personal, and most of it had come by the wife, and the divorce was obtained by her.

But in *Ames v. Norman*, 4 Sneed, 683, decided in 1857, the very year in which the complainant obtained her divorce, the point now under considera-

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tion was directly passed upon. A tract of land held by the husband and wife jointly, by entireties, had been levied on and sold for the husband's debt, and afterwards a divorce *a vinculo* had been obtained by the wife. The question was as to the effect of the divorce upon the purchaser's rights. Upon the theory now maintained in behalf of the defendants, the effect was the same as if the husband had died at the time of the divorce. But the Court, while, of course, conceding that if the husband had still held his interest, the divorce which made the parties "*twain*," would have transformed the tenure by entireties into one by moieties, yet held that the purchaser's rights were unaffected by the divorce. Judge McKinney, who delivered the opinion of the Court, said, on page 694:

"The decree in this case would seem to take it for granted that, upon a dissolution of the marriage by a divorce at the suit of the wife, the same legal consequences follow, in all respects, as if the marriage had been dissolved by the death of the husband. This is a very erroneous assumption, so far at least as relates to the question under consideration." He added on pages 696-7:

"We are of the opinion that the subsequent divorce had no effect whatever upon the rights of such purchaser. It is true the purchaser at execution sale succeeds merely to the right of the husband in the estate; that is to say, he acquires no other or different right, either as regards the

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quantity or quality of estate, than was possessed by the husband, and he takes it subject to all the rights, legal or equitable, existing in favor of third persons at the time of the sale. But, still, the purchaser is not to every intent and purpose placed in the shoes of the husband. On the contrary, he holds the estate independently of the husband, and of his future creditors, *and entirely free from all future accidents or contingencies that might, as against the husband, if the title had remained in him, have directly or indirectly affected the estate.*"

This, and what follows, expresses the very pith of the ruling in *Gillespie v. Worford* upon this point:

"The purchase in the present case was not made in view of the contingency of the wife's divorce at some future period, and cannot be affected by it.

"The defendant, by his purchase, became invested with the right of the husband as it existed at the time of the sale; that is, a right to occupy and enjoy the profits of the land as owner during the joint lives of the husband and wife, subject to the contingency that, if the complainant survives her husband, his estate will then terminate, but, if the husband survives, he would then become absolute owner of the whole estate."

The doctrine of this case, in the abstract, is, that the purchaser of the husband's interest during the coverture, takes it as the husband then holds it, and retains it unaffected by a subsequent divorce. The decision must, of course, have been the same

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if the husband had himself conveyed his interest to the creditor in satisfaction of the debt, or had sold it to raise money to pay the debt, or for any other purpose. The circumstance that the sale was in *invitum*, under legal process, did not make a different case from the voluntary sale of the same property by the debtor himself. The decision in *Gillespie v. Worford*, upon the point under consideration, was simply an application of the principle of *Ames v. Norman*, and it is a little remarkable that Judge Milligan, who delivered the opinion of the Court, did not refer to this case and reinforce his reasoning with its authority.

In *Allen v. McCullough*, 2 Heis., 189-90, Judge Nelson cited both of these cases approvingly, as equally authoritative to establish that the legal consequences of a divorce *a vinculo* are different from those of a termination of the coverture by the parties.

We have seen that *Gillespie v. Worford* was assumed to be the law upon the point in question, in the subsequent case of *Aiken v. Mumford*, brought by the same complainant, who had in the meantime become Mrs. Aiken, and who is the complainant in the present case.

The rule in question was not so devoid of considerations in its favor as seems to be conceded even by the counsel who now uphold it upon the principle of *stare decisis*. We say *was* not, because, owing to the Act of 1849-50, taking away from the husband and his creditors

the power to sell the wife's realty for his lifetime, the rule has, except indeed in the infrequent case of the tenure by entireties, become a thing of the past. Before the passage of this Act, the policy of the law was, to render the husband's interest in the wife's realty available to him and his creditors. But if it could be sold by him, or *in invitum* by his creditors, only as subject to the contingency of a divorce *a vinculo* at the wife's instance, for which several causes existed, the purchaser's tenure would have been recognized as so insecure as to have rendered the sale a sacrifice. Thus, the husband's interest would have been of little avail for disposition either to him or to his creditors. And, then, to allow the wife to reclaim the lands upon the divorce would generally have been to allow her to profit through her own fault. For even where the husband furnishes the salient cause of divorce, we should generally find, if we could see behind the scenes, that the wife has not been wholly blameless for his misconduct. It is seldom that in such cases either party is faultless. Indeed, it is quite conceivable that where a thriftless husband had squandered the lands of his wife for his lifetime, and thus reduced her and her children to destitution, he might, through his very love for his family, have afforded her a cause of divorce, the more especially as he could have done so without disgrace, by merely deserting her for two years. Then, she having obtained the divorce, and reclaimed her lands, they might have remarried.

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What collusion there might have been in this, however afterwards suspected, could rarely have been detected and exposed.

The purchaser could not have intervened in the divorce suit, though aware that no defence was to be made, and possessed of evidence to defeat the bill if he were allowed to produce it. And then, the divorce might have been procured in a distant part of the State, without his knowledge, or even in a distant State, to which the parties might have removed. Ought the purchaser's rights to be affected by the result of a suit between other parties, in which he could not appear?

But, whatever may be thought of the wisdom of the rule, we cannot but regard it as the deliberate policy of our State upon the subject, however different it may be from that of our sister States, and however preferable the latter may appear to the text writers. And our disinclination to reverse it is powerfully augmented by the appeal that is now made to the principle of *stare decisis* in behalf of the present complainant, who has already twice suffered from the rule, but who might suffer perhaps even more from its reversal, which, by retroactively putting her in default, in not having seasonably enforced rights which this Court decided that she did not have, would now estop and bar her absolutely; and thus she would have been misled by this Court to the loss of her property.

We hold, then, that complainant is entitled to a remainder interest in her original share of the lands

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in question. Her right to possession will accrue upon the death of her former husband, C. K. Gillespie. And she is entitled now to have removed the cloud upon this remainder, arising from the powers of attorney and the conveyances aforesaid, which, as against her, were invalid.

It is, however, insisted that there are 192 acres of the original tract in question remaining undisposed of, and that complainant ought to be thrown upon this land before being allowed to disturb the defendants.

On the other hand, it is denied that any of this original tract remains unsold. The dispute here is as to the dimensions of the original tract. This is a rectangle. One of the sides is unquestionably 168 poles. The controversy is as to the length of the other. The language of the original deed conveying the tract, is, as to this side, "thence east 190 poles to the creek, crossing it, the same continued 540 poles to a stake, &c." The question is whether the 540 poles are additional to, or inclusive of, the 190. If additional, then this side of the rectangle is 730 poles; if inclusive, it is but 540. In the former case, the tract contains $766\frac{1}{2}$ acres, and the latter 567. The deed calls for 766 acres; moreover, this tract was one of six lots into which a larger tract was divided for partition. The other lots contained, respectively, 730, 757, 822, 766 and 766 acres. The dimensions of these lots corroborate the estimate of the deed making this equivalent lot contain 766 acres, rather

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than only 567. And, then, it appears that 574 acres have been conveyed away out of the tract—7 acres more than the smaller estimate of the tract. On the whole, then, we take it that the tract contained 766 acres, and not merely 567.

There appears to be no trace in the Register's office of what has become of 192 acres of the tract. But, it by no means follows that they remain undisposed of by complainant and her brothers, and in view of the date of the latest of their registered deeds to other portions of the tract, March 25, 1850, some thirty years ago, this seems very unlikely. If such *were* the fact it would doubtless have been clearly and affirmatively shown by the defendants, and not left to be inferred from the mere absence of records in the Register's office, a very uncertain reliance, as we all know that gross carelessness in having deeds registered was formerly far from uncommon, especially "out in the provinces."

The 192 acres were, doubtless, disposed of by complainant, her husband, and brothers, and their deed or deeds left unregistered. Subsequent conveyances were probably duly recorded, while the lapse of time seemed to render the absence of the original ones unimportant. It was incumbent upon the defendants to establish the existence of this portion of the tract, undisposed of by the original owners. They have failed to do so. We are, therefore, not called on to declare what figure it would have cut in the case if it had been made out.

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Two questions remain,—that of a proper restitution of purchase money, and that as to an allowance for improvements. The purchase money paid for the 92 acres sold to Black, and for the 147 acres sold to R. C. Suttle, was the estimated value of the entire fee simple of the lands. One-third of this was paid, either to complainant herself or to her husband with her consent and by her direction. The purchasers got all they bargained for, except complainant's remainder interest in an undivided one-third of the lands. Upon the death of C. K. Gillespie, complainant will reclaim this much of what was paid for. Therefore, for so much of the purchase money of the two tracts as represented the relative value of complainant's remainder, the purchasers received no consideration. Such rights as they had they transmitted to their successors in interest, the present holders. Upon the plainest principles of equity, before complainant can be allowed to deprive them of this portion of the lands, she must make a proper restitution of the purchase money that was received therefor by herself and her husband. Asking equity, she must do equity. 2 Story's Eq. Jur., sec. 707.

The principle is none the less applicable where the transactions sought to be avoided are those of infants, lunatics, or married women—persons under disability. *Smith v. Evans*, 5 Hum., 70; *Alston v. Boyd*, 6 Hum., 508; *Pilcher v. Smith*, 2 Head, 208; *Hilton v. Duncan*, 1 Cold., 320; *Wright v. Dufield*, 2 Baxter, 218.

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In *Pilcher v. Smith*, it did not distinctly appear whether the money was paid to the husband for himself or as the agent of his wife; but, surely, that was immaterial, as, in either event, he had the right to appropriate it to his own use the moment he received it.

It is well settled by these authorities that the purchase money received for land, where the sale is avoided, may be made a lien on the land.

It is objected by complainant, that it is now impossible to say what part of the purchase money was paid for the wife's remainder. But this is not difficult, in theory at least. From the one-third of the purchase money paid by Black and R. C. Suttle for the two tracts in question, as the price of the fee simple of complainant's interest, deduct the life estate of C. K. Gillespie, as of the dates of the sales, and the residue will represent what was paid for complainant's remainder. The proportion of the value of the husband's life estate to that of the fee simple, can be ascertained with the aid of the tables, his age being carried back duly. What is found to have been paid for complainant's remainder, should be a charge upon her interest, as of the dates of the original sales. The proper amount can be ascertained by a reference.

Complainant cannot be charged with anything on account of any improvements that may have been made upon her lands. For the decisions upon the subject of an allowance for improvements to parties evicted, see *Bristol v. Evans*, 2 Tenn.,

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341, and *Townsend v. Shipp's Heirs*, Cook, 300, (Cooper's Ed.), and the editor's notes to these cases; also *Jones v. Perry*, 10 Yer., 59; *McKinley v. Holiday*, Ib., 479; and *Gee v. Graves*, 2 Head, 245.

The substance of the law upon this subject is embodied in sec. 3261 of the Code: "Persons holding possession in good faith under color of title, are entitled to have the value of their permanent improvements set off against the rents and profits which the plaintiff may recover."

The claim for improvements may be asserted in equity (sec. 3259), *Avent v. Hord*, 3 Head, 462. But, whether asserted at law as a set-off against rents and profits, or in equity, the extent of the claim is the enhancement of the land by reason of the improvements, not exceeding the amount of the rents and profits.

In the present case, as the possession of the defendants has been, and until the death of C. K. Gillespie, will be, perfectly lawful, no rents and profits will be recoverable against them at the date to which the present decree will apply; and where there are no rents and profits, there can be no allowance for improvements.

The costs of the cause in both Courts will be borne by the defendants. The decree of the Chancellor will be reversed, and a decree entered here in conformity with this opinion.

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After the foregoing opinion had been delivered, applications were made to the Court to reconsider portions of it, and upon a subsequent day of the term the following opinion was delivered by R. McPHAIL SMITH, Sp. J.:

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The head-note of this opinion is incorporated with that of the preceding one, which see.

The opinion heretofore delivered in this case has not had the good fortune of pleasing either side. Complainant asks for a reconsideration of that part of it imposing upon her the duty of restitution of purchase money; and the defendants of that part of it denying to them compensation for improvements.

It is argued that complainant cannot be required to make any restitution of purchase money, because neither John Black, the original vendee of one of the two tracts in question, nor the personal representative of R. C. Suttle, the original vendee of the other tract, is before the Court, for which reason the equities between the parties involved cannot be comprehensively adjusted. But if a proper restitution of the purchase money is the condition of the relief sought by complainant, then if, for want of parties, the Court cannot impose the condition, it follows that, for want of parties, it cannot grant the relief. Complainant's conten-

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tion would seem to be that her bill has been so deftly framed as to obtain the relief and yet elude the condition. That this is the condition of this relief, is established by the cases cited in the foregoing opinion.

Thus, in *Hilton v. Duncan*, 1 Cold., 321, it was said that it would be a fraud for a married woman to avoid her contract without restoring the purchase money, and that, "as an incident to the rescission," the Court will order the repayment of the money, and will declare a lien to secure it."

In *Wright v. Dufield*, 2 Baxter, 222, the following language was used:

"On the rescission of the sale, it is the settled practice in this State to require the vendor, *as incident to the relief granted him*, to restore the purchase money he has received, and the amount paid upon the purchase will be held a lien upon the land, even against a lunatic or a married woman." It was added: "The vendor is bound, upon an immutable principle of natural justice, to refund the purchase money, before being entitled to demand back the property sold." And it was said that "the mere effort to avoid the contract without restoring the purchase money, is itself a fraud which will not be permitted."

In the next paragraph, the proper limitation is stated, that "the contract on the part of the purchaser must be free from the imputation of fraud or imposition." The sale there appeared to have been made through over-confidence of the wife in

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the husband; but as the purchaser did not appear to have been in fault, the restitution of the purchase money was decreed.

For a case falling within the limitation, see *Rhea v. Martin*, 1 Leg. Rep., 292, where the wife was moved by undue influence of her husband, co-operating with the purchaser's threat of depriving her of the land by a Chancery suit, unless she consented to sell it.

In *Wiley v. Heidell*, 12 Heis., 100, it was said that a party would not be allowed to avoid his contract without restoring the purchase money, and that the uniform practice had been to declare a lien upon the land to secure its payment. That this was to be done in the decree of rescission, and "*as an incident thereto.*"

No shadow of unfairness rests upon the present case. The complainant's attorneys in fact were her brothers, and her interest was sold at the same time with theirs in lands belonging to them jointly. She was privily examined as to the execution of her powers of attorney, and acknowledged that she acted freely, voluntarily, and understandingly, and without constraint from her husband. At that time, and indeed until the decision in *Gillespie v. Worford*, in 1865, it was generally supposed that such powers of attorney were valid. And lastly, N. G. Taylor, one of these brothers, complainant's witness, deposed that he paid over her share of the purchase money, partly to herself and partly to her husband by her consent and direction.

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Unquestionably, the vendors and the vendees acted in perfect good faith, both believing the title communicated to the latter to be perfect. The law was, some eighteen years afterwards, settled contrary to the general understanding at the time, and thereby complainant is enabled to repudiate her powers of attorney, and at the death of her former husband, C. K. Gillespie, she may reclaim her lands; but she cannot exercise this hard right without complying with its condition. The lands must be charged with a proper restitution in favor of the holders of them.

This being the condition of the relief sought, complainant's objection to this condition is, in substance, an objection to her own bill for want of parties, which, if successful, would necessitate the dismissal of the bill, or its remanding, for the necessary new parties to be brought in by supplemental bill.

It is inadmissible for complainant to object to her own bill for want of parties. In 1 Dan. Pl. and Pr., 293, it is said: "The objection for want of parties ought to proceed from a defendant; for it has been decided that the plaintiff bringing his cause to a hearing without proper parties cannot put it off without the consent of the defendant."

Of course, if no decree can be made doing justice between the parties to the suit without affecting the interest of absent parties, the Court will not proceed, but will itself take the exception, and remand the case to have the necessary additional

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parties brought in. But the mere non-joinder of persons who might indeed have been proper parties, but whose absence does not prejudice the right of those who are before the Court, will not, even at the defendant's instance, constitute a fatal objection at the hearing. Story's Eq. Pl., sec. 74a.

If the Court can make a decree at the hearing that will do entire justice to all the parties, and not prejudice their rights, notwithstanding the non-joinder, it will not then allow the objection to prevail. *Ib.*, sec. 237.

Our Code provides that a bill shall not be dismissed for want of parties, unless the objection be made by motion to dismiss or demurrer.

But we do not think that the bill in the present case was originally objectionable, even at the instance of the defendants, for want of parties. Because if additional parties had been made, the decree might have been more comprehensive, it does not follow that these were necessary parties. Thus, a mortgagee may foreclose, or a vendor's lien be enforced, against the heir alone, without bringing in the administrator, though the personalty is the primary fund for the satisfaction of the debt. Story's Eq. Pl., sec. 76b; *High v. Batte*, 10 Yer., 188; *Edwards v. Edwards*, 5 Heis., 123.

A mortgagor seeking to redeem, where the mortgage has been assigned, may proceed against the last assignee alone: Story's Eq. Pl., sec. 189. The *status* of the complainant here somewhat resembles

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that of a mortgagor seeking to redeem from the assignee of the mortgagee who is in possession. She asks to have declared her right to reclaim lands, upon the condition (annexed by the law) of making a proper restitution to their holders—this being made a lien upon the lands—just as the mortgagor asks to have his rights declared to reclaim lands upon making a proper repayment of what is a charge upon the lands. In neither case, unless an account of rents and profits received by intermediate parties is required, is there any necessity of making any but the last holders of the lands parties. In the present case, as complainant's right to possession will not commence until the time to which this decree relates—the death of C. K. Gillespie—there can be no question of rents and profits.

It is said that there is no privity between complainant and defendants, and that therefore she cannot be required to make any restitution directly to them, to be charged as a lien upon her lands in their favor. "The term privity denotes mutual and successive relationship to the same rights of property:" 1 Green. Ev., sec. 189. It is true that the defendants have not succeeded to any of the property rights of complainant in these lands. But this is because none of these rights passed to the original vendees, John Black and R. C. Suttle. The *hiatus* in privity occurred upon the invalid sales to them. Yet, unquestionably they would have been entitled to restitution of purchase money,

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to be secured by a lien on the lands, had these been reclaimed in their hands.

Now, the defendants are in perfect privity with them, and represent, as the present holders of these lands under them, all the rights as against complainant, and as against the lands themselves, which the original vendees would have had if they were still the holders of the lands.

The right of restitution clings to the lands themselves. The restitution is to be made a lien on the lands. In the language of this Court in *High v. Batte*, 10 Yer., 188, with reference to the vendor's lien, it "attaches to the land, so that the land, so to speak, is debtor." Its practical value consists rather in the charge against the land itself than in a personal claim against the reclaimant, who is often a person under disabilities, exempt from personal liability. If the land is disposed of, this dormant lien, to be quickened into life by the exercise of the true owner's right of reclamation, passes with it, and the holders who are finally evicted are entitled to the benefit of the lien. Nor does it matter that the last holders may have the warranties of their predecessors up to the original invalid sale. So much the better for them if they have. But this no more interferes with their right to the benefit of the lien on the land itself, for restitution from the reclaimant, than the recourse which the holder of a vendor's lien note

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may have upon intermediate endorser interferes with his right to resort first to the land itself. The personal liability of the warrantors is additional to the lien on the land itself.

Suppose that a married woman's land is invalidly sold, and then resold for cash, *without* warranty, and then reclaimed. Has the last purchaser no right to restitution? The first purchaser would have been entitled to this equity. Can his sale have annihilated it, so that now the woman may keep what she got for the land and take back the land too? Surely not. She must make due restitution. The restitution must of course be made to the last purchaser, from whom the land is taken. It is to be charged on the land itself. The land is virtually the debtor for it. If the last sale had been *with* a warranty, how could that have altered the case as to the lien upon the land itself?

It is said that the price, in the present case, may have been discounted on account of the contingency of reclamation. But, if so, the right to proper restitution upon the reclamation will have entered into the estimate. The amount of the restitution, presently to be considered, is something fixed, not requiring for its ascertainment, where, as in the present case, there is no question of rents and profits, any consideration of equities between intermediate parties, and the warrantor, if there was a warranty, will receive the benefit of it in reduction of his liability. The restitution will belong to the holders of the lands,

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under the sale that is avoided, in the proportion of their respective interests at the time.

It is not perceived how the want of parties, if it existed, could avail complainant here, in any view of the case. For, suppose that, for this reason, the Court had now only to declare complainant's right to reclaim her lands at C. K. Gillespie's death, without saying anything about the condition of restitution, yet this would not enable her ultimately to elude the restitution, any more than if she had waited until her right to possession had accrued and then brought ejectment for her lands. For what would have been the result of that line of action, see *Pilcher v. Smith*, 2 Head, 208. At most, the Court would now have to leave open the question of restitution, thereby only postponing it until the proceedings hereafter to be instituted by complainant to obtain possession of her lands. We think that the question can be passed upon now between the parties who are before the Court.

It would be strange if, in a case like this, where the original conveyee might have been dead, and his estate wound up, possibly for fifty years, and his administrator dead, and his estate long since wound up, the original administration had to be reconstituted merely to provide a technically regular *conduit* through whom the purchase money to be refunded upon reclamation of the lands invalidly sold might reach the pockets of the parties ultimately entitled to it, all of these being before the Court.

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It is asked by what process is it to be ascertained what amount was paid for complainant's remainder? Her one-third of the purchase money of the lands sold by her brothers, her husband, and herself, less the husband's life estate in this third, was what was paid for the wife's remainder. The problem is, to determine the husband's life estate. And the principal question here is, what must be taken as the length of the husband's life subsequently to the sales to Black and B. C. Suttle, C. K. Gillespie being still alive.

If these sales had been made with reference to the separate values of the husband's life estate and the wife's remainder, then these values would have to be estimated as of the dates of the sales, according to the manner set forth in *Carnes v. Polk*, 5 Heis., 244. See also Scribner on Dower, 612, 655, treating of the assignment of a money equivalent for dower. But as there was no such separate reference, the understanding being that the entire fee simple of the three joint owners was purchased, and simply *that* being valued, we think that the valuation of the life estate of C. K. Gillespie at these dates ought to be made upon the basis of his actual length of life subsequently to the sales, and not upon the basis of such an estimate as must have been made at these dates if the sales had been made with reference to the life estate and the remainder. And as C. K. Gillespie is still alive, and the counsel of the complainant intimate that his days are likely to be indefinitely

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prolonged, and the decree in this case is to apply to the time of his death, when new proceedings, upon the basis of the rights now declared, will be necessary for their realization, it seems best to remit the ascertainment of the value of this life estate, and consequently of what was paid on account of complainant's remainder, to these new proceedings, when the actual length of life, which would now have to be guessed at, will have become certain.

This disposes of all that has been suggested in behalf of complainant. But upon the further reflection that has been bestowed upon the subject since the application for a reconsideration, a question has occurred to us which has not been without difficulty, especially as it was not noticed by the counsel, who have discussed so ably and exhaustively the residue of the case. This question is, whether the restitution to be made upon reclamation of lands invalidly sold must always consist of the full amount of the purchase money and interest, however long ago the sale may have been, and however greatly the land may since have depreciated; or whether there should not be some limit short of this, and if so, what this should be.

When the former opinion was prepared, this was not recognized as a practical question in the case; and, as stated, it was not raised by counsel. But it now appears to be not impossible that what will be found to have been paid for complainant's remainder, with interest all the way down

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to C. K. Gillespie's death, may exceed the value at that time of complainant's undivided one-third of these lands, so that we feel called upon to dispose of the question that has just been stated.

Put an extreme case. Suppose an invalid sale of land by one then, and for many years continuously thereafter, under disability, just before the termination of which the land is resold for a small portion of the original price, it having greatly depreciated, or valuable improvements thereon having been destroyed. Immediately after the termination of the disability, the land is reclaimed. Must the last purchaser receive the original purchase money with interest all the way down, amounting, possibly, to ten times what he paid for the land, with interest. Such a requirement would, of course, destroy the right of reclaiming the lands. And, in cases where it fell short of this, it might yet often considerably overpay the party evicted. The last purchaser, who is evicted, is the only party entitled to compensation. If he is indemnified, the requirements of equity are met. He ought not to be over-indemnified.

What, then, does the law regard as full indemnity upon an eviction? Our rule is, where there is a warranty of title, to give the purchase money and interest: *Elliott v. Thompson*, 4 Hum., 99. Some states give the value of the land at the time of the eviction, but our rule is as stated: See 4 Kent, marg. pp. 475-7, and notes. This, then, in legal contemplation, is indemnity for the loss of the land.

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If the last purchaser took no warranty, or bought under *fi. fa.*, or at Chancery sale,⁷ where no warranty was to be had, still if when the land is reclaimed he can get back his purchase money and interest, he must be regarded as indemnified, since this is all he could recover from his vendor if he had a warranty of title. We think, then, that the restitution to be charged upon the land in favor of the last holder,⁸ when the land is reclaimed, ought never to exceed his purchase money with interest. Treating that as having been made with a warranty, whether in fact there was one or not, and limiting the indemnity upon eviction to the last purchase money and interest, no injustice can be done. This limitation may sometimes seem to operate somewhat arbitrarily, and it may sometimes permit the reclaimant to retain some of the consideration received for the land reclaimed, but, upon the whole, it appears to be equitable, and it is based upon an obvious analogy. Its application in the present case will require the disentanglement of some complication.

John Black bought the tract of 92 acres from complainant, her husband, and brothers, in 1846, and R. C. Suttle that of 147 acres in 1847. Black sold the 92 acres to R. C. Suttle in 1857. After the death of R. C. Suttle, 100 acres of the 147 acres were, as part of the tract of 508½ acres, purchased by L. D. Suttle, under the decree in settlement of the estate of the former. The time of this sale does not appear. So that 47 acres of

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the 147 were last sold in 1847, in the original sale; the other 100 acres, under the decree just mentioned, and the 92 acres, in 1857. Complainant's interest in these lands was an undivided one-third.

It must not be forgotten that we are dealing with a remainder. It was only this remainder of which the original sales were invalid. We have first to ascertain what was paid on account of this remainder as included in the purchases of Black and R. C. Suttle in 1846 and 1847. This, with interest from the dates of these sales, will be the *maximum* charge that can be made upon complainant's interest in these lands, in favor of complainant.

For the purpose of applying the limitation that has been explained, the amounts as to the two tracts in question must be kept distinct, and then the amount as to the tract of 147 acres must be divided into two portions in the proportion of 47 to 100, as 47 acres of this tract were not resold, while 100 acres of it were subsequently sold, as a part of the tract of 508½ acres purchased by L. D. Suttle under the decree in settlement of R. C. Suttle's estate.

The portion applicable to the 47 acres cannot be reduced, there having been no subsequent sale of the 47 acres. But, it may be that what was paid on account of the remainder in an undivided third of the 100 acres, with interest from the time of L. D. Suttle's said purchase, will be less than what was paid on account of this part

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of the remainder on the original sale of the 147 acres to R. C. Suttle, in 1847, with interest from that much earlier date, although, owing to the consumption of the candle of the particular estate in the meantime, the relative value of the remainder will have been constantly increasing, and moreover the lands themselves may have been enhancing.

The time of L. D. Suttle's purchase of the 508½ acres being ascertained, it must then be determined what part of the purchase money therefor was applicable to the 100 acres (of the 147 acres,) included therein, and then the life estate (for C. K. Gillespie's life) in one-third of this part of the purchase money being estimated as of that date, and deducted from this third, the residue will represent what was then paid on account of complainant's remainder in an undivided one-third of the 100 acres; and this residue, with interest from that time, will be compared with what was paid for the remainder in this portion of the 147 acres in 1847, with interest from that date, which will not be allowed to exceed the subsequent amount with interest.

In the case of the 92 acres, the remainder therein, with interest from the date of the sale to John Black, in 1846, will be compared with the remainder therein as of 1857, the time of the last sale of the land, (by Black to R. C. Suttle), with interest from that date, the former amount not to exceed the latter.

The amount of the restitution, when ascertained; will be made a lien upon complainant's one-third of the two tracts, of 92 acres and 147 acres.

As to the matter of improvements, the defendant insists that in the partition of the lands hereafter, between them and complainant, the shares containing the improvements ought to be allotted to them, and that the shares ought to be so laid off as to produce this result, citing the case of *Reeves v. Reeves*, 11 Heis., 675.

We do not mean, in refusing to charge complainant's interest in these lands with improvements, to intimate, still less to adjudge, that, in the future partition of the lands, no regard is to be paid to the fact that the improvements were made by the defendants, or their predecessors under the sales avoided by complainant. We do not think that any adjudication of this matter can be made in the present suit. It will be time enough to deal with it in the partition suit, when that comes to be disposed of.

The question how the lands are, under all the circumstances, to be equitably partitioned, will belong to the partition suit.

We have now disposed of all that is properly before us in the present case. In the language of counsel—"Sufficient unto the day is the evil thereof."

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FREEMAN, J., delivered the following dissenting opinion.

Never having assented to the correctness of the opinion in the case of *Gillespie v. Worford*, 2 Cold., 632, I take occasion to state a few of my objections to the ruling of the Court.

In the first place, I hold that where the married woman is authorized to convey by deed, as she is by our law beyond question, then she may as well make that deed by an agent or attorney in fact as in person. That authority to make the deed includes the usual and known methods and agencies by which such an act is done, and by an agent or attorney is, and was when she was authorized to make a deed, one of the well known and usual means by which all parties competent to make deeds were accustomed to perform such acts. In a word, I hold that what a party can do by himself he can do by another, or an agent. The maxim of our law, that what a man does by another is done by himself, I think strictly applicable to the question.

The fallacy of the argument of Judge Milligan in the opinion referred to, is in following authorities holding that a married woman could not make a valid power of attorney, which are based on the fact that, by reason of her coverture, she was incompetent to contract. The want of application of the principle to the case where she did have the power to make the contract, I think is clear, she

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has the power to do the major act, that is, make the deed of conveyance, and it seems to me this necessarily involved the power to do the minor act, to-wit: to perform all that a natural and usual means by which such an act may be done, and that the end includes the means by which it may be effected. In view of the well known fact that such had been the universal understanding of the profession from the organization of the State down to the case in 2 Cold., and the additional fact that immense bodies of our lands had been conveyed by non-residents by means of powers of attorney executed by husbands and wives, I have always felt that decision was unwise in policy as well as erroneous in law.

But the main question debated before us, and in which I cannot agree to the conclusion arrived at by a majority of the Court, following the opinion in 2 Cold., is, that the husband's right by courtesy, or his vendee after the dissolution of the marriage by divorce, continues, and is not ended by the divorce.

The defendants in this case hold under a conveyance from the husband and wife. The wife's deed is held void by reason of having been made under a power of attorney. She was divorced and freed from disability many years since, married again, and is again discovert—the first husband remaining alive, the second husband being dead.

The statute of limitations, by reason of adverse possession of defendants, bars her right, in any

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view, unless it be the vendees of the husband and wife are entitled to an estate for life from the husband by reason of his deed, made while he was husband

The opinion combatted holds that a purchaser from the husband takes an estate for life, that is, an estate by courtesy, for the life of the husband by reason of the marriage, seizin of lands during coverture, birth of issue, independent of the continuance of the marriage relation. In other words, that though the woman does not die his wife, nor he survive her as her husband, still the same results follow, as if the facts were as stated. To this I cannot assent.

On marriage and birth of issue, the husband became tenant by courtesy initiate, but his estate is not consummate until death of the wife, which completes his title by the courtesy of England, is the language of all our books defining this estate: 2 R. C., 128.

It is the death of *his* wife that consummates the estate, not the death of a woman who is not his wife, it may be the wife of another man, as in this case, one who has been the wife of another, and may again form that relation. The case then being but initiate, and never consummate during the existence of the marriage relation, being dependent on, growing out of, and existing by means alone of the marriage relation must necessarily fail, when this relation ceases, as it seems to me. In fact, it never arises in completed form—it can

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never do so—because the consummation can never take place. The condition of consummation can never happen, that is the death of his wife. She is not his wife, in fact may die the wife of another man.

Suppose the case of marriage, birth of issue, seizin of lands, and a divorce, then the marriage of another husband by the wife, it may be three or four births of children by each, and divorce, and then the wife dies, leaving the four or five husbands, and fathers living, who shall have courtesy in her lands? Shall their rights be fixed *pro rata*? If so, by what rule—the number of years they had her to wife or the number of children born to each? This is as troublesome a question, it seems to me, as the one propounded by the Sadducees on a certain occasion of the seven successive brothers who married the woman under the Mosaic law, and all died, and then the woman died. They said, "Whose wife shall she be in the resurrection?"

The question in the case put is, which of the husbands surviving is entitled to the relation? Whose wife was she when she died? I would say, as a matter of course, the husband whose wife she was at her death takes the estate incident to the marital relation. The principle of the opinion gives it to the man who has ceased to be husband, and who is declared by the decree of a competent Court to have forfeited the rights to the position of husband for misconduct. Husbands could, under

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this view, well afford to be divorced from undesirable wives who had estates, for no forfeiture of the estate gained by the marriage will result, or they may well sell all, and purchasers may well buy, and be secure for his life, he may pocket the proceeds and the wife cannot reach it until after his death, though she may need and suffer poverty by reason of his alienation.

It seems to be thought the rule is one beneficial to the wife, but this is a mistake as a general rule. If she is to be benefitted, generally it would be by being entitled to her estate at once, for ordinarily it may be assumed she will die as soon as the husband. In this case it happens she is still alive, but it may yet be that her husband will live as long as she does. So we may declare her right, and she not live to enjoy it.

I need but say, the argument that the husband's vendee can possibly take an estate beyond that which the husband had to sell, stand higher or held by a broader title, is one that I am unable to comprehend. It may be supported by reason, but I am frank to say I have not been able to see the basis on which it can be rested. Until it can be shown that a man can convey what he has not himself, that a stream can rise above its source, I shall never be able to see how the vendee of the husband can take an estate from the husband of greater dignity or duration than that of the husband himself. I need not cite or comment on authorities. I believe it is not claimed that any case

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but the one mentioned holds the doctrine contended for, and this sustained by the principle of the 4th Sneed case, cited in the opinion incidentally referred to in other cases. I have examined a number of authorities, and all hold in accord with the view I here maintain.

I can see no strong equity in favor of the rule contended for—no reason of public policy—and when a rule is totally inconsistent with sound reason and legal logic, I feel no hesitancy in overruling it, however often it may have been declared, unless it was because it was the basis of property titles, which public policy demands should not be disturbed

Here the only effect of adopting this illogical, and, as I think, unsound rule, is, not to sustain and quiet titles, but simply to destroy titles long acquiesced in for which a valuable consideration was paid, and on which the parties had rested with confidence for a quarter of a century.

I have felt the force of the argument drawn from the principle *stare decisis*. It is one always presented by ingenious counsel, and often referred to, and properly by Judges in support of their opinions. However, I must say my own observation is, that generally orthodoxy on this doctrine consists in adhering to it, when it supports the views of the particular Judge preparing the opinion, and disregarding its obligations when the decisions do not serve this useful end. For this reason, I do not

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feel that absolute deference to the authority of this rule that I might otherwise have felt.

Believing the principles of the case of *Gillespie v. Worford* to be radically wrong, I think the case should be overruled, and dissent from the opinion of the majority holding the contrary

JOHN C. BROWN, Admr., v. R. C. GARDNER.

1. A contract for the sale of a plantation, with the personal property thereon, lying in Tennessee, the grantor domiciled in Athens, Alabama, the grantee in Nashville, Tennessee, each of these places being at the time within the lines of the military forces of the United States, is not invalid, either by reason of the non-intercourse acts of Congress or the rules governing the intercourse of belligerents during the late civil war, as expounded by the Supreme Court of the United States in *Montgomery v. The United States*, 15 Wall., and *The United States v. Lapene*, 17 Wall. Nor is a deed made in pursuance of such a contract void, although when it was executed, Nashville remaining within the military lines of the United States, Athens, Alabama, and that portion of Tennessee in which the plantation is situated, had been reoccupied by the Confederate forces, both grantor and grantee actually residing within their lines.

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2. Per Malone, Sp. J.: The United States had the right to place whatever restrictions it saw fit upon the trade between citizens of the Confederate States within its lines of military occupation and those without those lines, and when these restrictions are announced through the proper department it is the duty of the State Courts to observe and enforce them.
3. A note executed in Tennessee, by a citizen of that State, to a citizen of Alabama, bearing on its face interest at the rate of eight per cent. per annum, the legal rate in Alabama, is manifestly an Alabama contract, and is valid.
4. A contract for the sale of land upon credit is not usurious, because the price agreed on is a sum equal to one for which the land had been offered to the purchaser, cash, plus ten per cent. per annum thereon for the time credit is given.
5. During the late civil war the owner of negroes who had conveyed them to a trustee to secure their purchase money, both owner and trustee residing in Tennessee, attempted to remove them from that State for greater security. The *cestui que trust* persuaded the negroes to remain. *Held*: The *cestui que trust* had the right so to do, and if loss ensued it is *damnum absque injuria*.

FROM GILLES.

Appeal from the Chancery Court of Giles County. W. S. FLEMING, Ch.

F. M. JONES and J. S. WILKES, for Complainant.

ED. BAXTER and BRIGHT, for Defendant.

COOPER, J., having been of counsel, took no part in the decision.

THOMAS H. MALONE, Sp. J., delivered the opinion of the Court.

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On the 7th day of May, 1862, Richard W. Vasser and R. C. Gardner entered into the following contract in writing:

“Memorandum of an agreement made in Athens, Alabama, this, the seventh day of May, 1862, between Richard W. Vasser, of the County of Limestone, State of Alabama, and Richard C. Gardner, of the County of Davidson, State of Tennessee: Whereas, the said R. W. Vasser has sold to said Gardner his tract of land, near Elkton, Tennessee, containing about fourteen hundred and forty-five acres; also all the negroes on said plantation, about ninety in number, and all of the stock, corn, fodder, farming utensils, together with all and every kind of property on or belonging to said plantation, for which the said Gardner is to execute to the said Vasser his notes as follows: four thousand dollars payable on the 1st of January, 1863; four thousand dollars payable 1st of January, 1864; four thousand dollars payable 1st of January, 1865; four thousand dollars payable 1st of January, 1866; four thousand dollars payable 1st of January, 1867; and forty thousand dollars payable 1st of January, 1867; all to bear interest at the rate of eight per cent. per annum if not paid at maturity. Said notes to be executed, and the deed and bill of sale to be executed at the earliest convenience of both parties.

“The said Gardner is to give a deed of trust on all of said property, both real and personal, to

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secure the payment of the purchase money for which the said notes are executed.

"The said Vasser has the right to exchange other negroes of the same value for any he may think proper to select of the negroes aforesaid.

"The said Gardner is to have the proceeds of said plantation for the year, and is to pay all the expenses of every kind in carrying on said plantation from the 1st of January, 1862, and is to furnish to said Vasser this year, to be delivered on said plantation, seventy-five bushels of wheat and one hundred bushels of meal.

"R. W. VASSER.

"R. C. GARDNER."

The record shows that the place and date of the contract and the residence of the parties are correctly recited, and that Limestone County, Alabama, and Davidson County, Tennessee, were then occupied by the military forces of the United States.

On the 8th of May, 1862, Gardner took possession of the property, and a few weeks thereafter removed his family to the farm, and resided there until the autumn of 1863. About the 1st of September, 1862, the Confederate forces again occupied both Limestone County, Alabama, and Giles County, Tennessee, while Davidson County remained permanently in the hands of the Federals.

On the 3rd day of November, 1862, Vasser and Gardner met at Pulaski, in Giles County, and executed the deeds provided for in the contract of

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May 7th. Whether the notes were then executed and delivered, or whether this had been done some weeks previously in Athens, Alabama, is somewhat doubtful, but not very material. In the deed of trust Gardner recites that he is a resident of Giles County.

After the battle at Murfreesboro, in January, 1863, Gardner made an effort to remove the slaves further south to a place of greater safety. This effort failed through the interference of Vasser, who claimed that, having a trust deed of the slaves to secure the purchase money due him, Gardner had no right, while such purchase money remained unpaid, to remove them beyond the jurisdiction of Tennessee. The slaves remained upon the place until Giles County was again occupied by the Federal forces, and were freed by the events of the war.

Vasser died in 1864. After the close of the war John C. Brown was appointed administrator of his estate, and Gardner made to him large payments upon his notes. He did not, however, meet them promptly at maturity, and on the 29th of January, 1869, Brown filed his bill in the Chancery Court at Pulaski to foreclose the trust deed. After the bill was filed, proceedings were stayed in consequence of the promise of Gardner to pay the balance remaining due within a specified period, and, in fact, over \$15,000 were paid by him between the date of the filing of the bill and September 17th, 1870, but having failed to

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meet a draft drawn on him by Brown, in April, 1871, the latter at once resumed active proceedings in the cause.

On the 10th of July, 1871, Gardner filed his answer, setting up and relying upon the following defenses:

1. That the original contract, and the deed, and the deed of trust, executed in pursuance thereof, were in violation of the non-intercourse Acts of the United States, and of the general law of the land, and are void.

2. That the notes executed to Vasser, and the contract on which they were based, are usurious under the laws of Alabama, and are void as to the whole interest.

3. That he was greatly damaged by the interference of Vasser when he attempted to remove the slaves South, and that he is entitled to set off this damage against any balance due upon the notes.

Proof was taken, and upon final hearing the Chancellor rendered a decree in favor of Brown, as of November 25th, 1875, for \$48,304.18, and thereupon an appeal was taken to this Court.

It is conceded by counsel for the defendant that the case of *Shaw v. Carlile*, decided by this Court in April, 1872, and reported in 9 Heis., is, if it should be adhered to, conclusive against them so far as their defense is based upon a presumed illegality in the original contract, arising out of an alleged violation of the non-intercourse Acts of

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Congress, or the general rules of international law governing the intercourse of belligerents. But it is urged that since that decision was rendered two cases—*Montgomery v. United States*, 25 Wall., and *United States v. Lapene*, 17 Wall.,—have been decided by the Supreme Court of the United States, which are in conflict with *Shaw v. Carlile*. It is properly taken for granted that this Court will promptly conform its decisions to those of the Supreme Court of the United States on all questions regarding the proper construction of the Acts of Congress, and will, moreover, yield the very greatest consideration and deference to the opinions of that high tribunal, even when not bound in duty to follow them, and this Court is requested to review and reverse its ruling in *Shaw v. Carlile*.

In that case the material facts are that in November, 1862, Mr. Shaw, residing in Augusta, Georgia, sold and conveyed to Mrs. Carlile, domiciled and actually residing in Memphis, Tennessee, a life estate in a tract of land lying in the latter city. Memphis was then in possession of the military forces of the United States, while Augusta was held by the Confederates. The purchase was effected by an agent, who passed through the Federal lines for that purpose.

This Court held the sale valid.

In *Montgomery v. United States*, the material facts are, that Burbridge, a loyal citizen of the United States, residing in New Orleans, had been, prior to the occupation of that city by the Federal

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forces, the agent and factor of one Johnson, residing in the parish of LaFourche, Louisiana. After the occupation of New Orleans by General Butler, and while the parish of LaFourche remained in the hands of the Confederates, Burbridge, describing himself as agent of Johnson, agreed to sell to Montgomery, a British subject domiciled in New Orleans, a crop belonging to Johnson, on which Burbridge had made advances above its value, and then on Johnson's plantation, in LaFourche Parish, describing the property as Johnson's, and in no way referring to his own interest in it.

The Supreme Court of the United States held that the sale was void.

In *United States v. Lapene*, the facts are, that Lapene & Ferre, a firm of merchants doing business and residing in New Orleans, before the capture of New Orleans by the forces of the United States, sent out a clerk to the country parishes of Louisiana to collect debts due the firm and to invest such collections in cotton. After the capture of New Orleans, and while the rest of Louisiana remained in the hands of the Confederates, the agent made purchases of cotton for his firm.

The Supreme Court of the United States held that Lapene & Ferre were guilty of trading with the enemy, Mr. Justice Miller and Mr. Justice Field dissenting.

It is obvious that if these three cases be confined to the precise points decided, they are not

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necessarily in conflict. Indeed, in *Montgomery v. United States*, Mr. Justice Strong delivering the opinion of the Court, quotes approvingly from the opinion of the Supreme Court of Massachusetts in *Kershaw v. Kelsey*, 100 Mass., 561, a case much like *Shaw v. Carlile* in its material facts, and upon which the latter case is largely founded.

It is equally obvious that there is no conflict with regard to the construction to be placed upon the proclamation of President Lincoln, of August 16, 1861. In *Shaw v. Carlile* it was argued that the proclamation was intended to regulate the commercial intercourse between the people of the United States and those of such portions of the Confederate States as might be occupied by the Federal forces, that it did not apply to the intercourse between the people of such occupied territory and those of the rest of the Confederate States, nor to sales of real estate situated in the territory of one of the belligerents by a citizen of the other.

In *Montgomery v. United States* and *United States v. Lapene*, the contracts were in the strictest sense commercial, and were well calculated, not only in theory, but in fact, to give aid to the enemy. They were sales of merchandise, not real estate. The parties were separated by hostile lines, and the proclamation of the President was neither relied on nor mentioned. The opinion of the Court was based upon the principles of international law modified to meet the exigencies of our peculiar contest.

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In these cases it is conceded, as held in *Shaw v. Carlile*, that ordinarily the line of non-intercourse is the boundary line between the territories of contending nations.

"But," says Mr. Justice Hunt, in *United States v. Lapene*, "the recent war in the United States was a civil war, in which portions of the same nation were engaged in hostile strife with each other. The State of Louisiana, although one of the United States, was under the control of the Confederate Government and their armies, and was an enemy's country. While the city of New Orleans was under such control it was a portion of an enemy's country. When that city was captured by the forces of the United States the line of non-intercourse was changed, and traffic before legal became illegal. This line was that of military occupation or control by the forces of the different governments, and not that of State lines."

These views, it must be admitted, are wholly irreconcilable with those expressed on this point in *Shaw v. Carlile*, but, as we have seen, that case was in part—and might have been exclusively—based on the position that sales and transfers of real estate by one belligerent to another are not inhibited by the laws of war.

This Court sitting in the State of Tennessee, now restored to its relations with the United States, and admitting their supreme authority under the Constitution and the laws made in pursuance thereof, should, as it seems to the writer, in all matters

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of this character, adopt and enforce the views taken and expressed by the United States through the proper department. If, therefore, the case at bar were in its material facts like *United States v. Lapene*, the contract should, in the writer's judgment, be declared illegal.

But the cases are in no material feature alike. In that case there was a sale of cotton. In this case there was a sale of land, the personal property passing as an incident and to be used thereon. In that case the principals were actually separated by hostile lines. In this case no hostile lines intervened. In that case the property sold was actually situated within the lines of the enemy. In this case it was situated within the Federal lines at the time of the original contract, and when the deeds were executed the property was situated, and both of the parties were actually residing—whatever may have been their domicils—within the Confederate line.

The fact that Nashville was permanently held by the Federals, while Athens passed several times in quick succession from one of the belligerents to the other, seems wholly immaterial. The cases cited upon this point apply to the intercourse between citizens of the States adhering to the United States and the citizens of such portions of the Confederate States as might from time to time be occupied by the armies of the former.

And finally, it cannot be seriously insisted that under the law as held in *United States v. Lapene*,

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the mere occupation of Nashville by the Federal forces would *ipso facto* impress upon one claiming Nashville as his domicile, but actually residing within the Confederate lines, the character of friend to the United States and enemy to the Confederate States. The doctrine of that case is manifestly applicable exclusively to traffic between parties actually residing on opposite sides of hostile lines, without regard to domicile.

This Court is therefore of opinion that the contract is not void by reason of the non-intercourse Acts of Congress or the laws governing the intercourse of belligerents during the late civil war, as expounded by the Supreme Court of the United States.

The second position taken by the defendant is that the original contract, and the notes executed in pursuance of it, are usurious under the laws of Alabama.

If regarded as a Tennessee contract, it would be usurious upon its face, because it provides that the notes after maturity shall bear interest at the rate of eight per cent. per annum.

But the parties were manifestly contracting, as they had the right to do, with reference to the laws of Alabama, and in that State eight per cent. per annum is the legal rate of interest. It is not, therefore, supposed that the contract is upon its face invalid, but proof has been made tending to show that the contract price of the property was \$40,000, and [that the five notes for \$4,000 each,

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specified in the contract, were executed for interest upon the principal sum at the rate of ten per cent. per annum; and this, as it is insisted, renders the contract usurious under the peculiar features of the Alabama statute. The statute is in these words:

"All contracts for the payment of interest upon the loan or forbearance of goods, money, things in action, or upon any contract whatever, at a higher rate than is prescribed in this chapter, is usurious, and cannot be enforced except as to the principal; and if any interest has been paid the same must be deducted from the principal and judgment rendered for the balance only." Rev. Code Ala., sec. 1831

It seems clear from the statements of Sloss—for no weight whatever is allowed to the casual conversations between the parties as understood and remembered by the blacksmith and the overseer—that Vasser regarded his property as worth \$40,000, was willing to take that sum for it, and would sell upon time only on condition of receiving in addition, annually while credit was given, a sum equal to ten per cent. upon \$40,000; and it is equally clear that he was apprehensive that the contract as proven, and by which his purpose was carried into effect, was obnoxious to the statute against usury. But, after all, the question is not what he supposed the law to be, but what it actually is.

Unfortunately the precise point seems never to

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have been decided by the Supreme Court of Alabama, but counsel for the defendant insists that the Legislature of Alabama intended to make usury something different from what would be understood by the term at common law, and that to constitute usury in that State, it is not essential, as it is understood to be elsewhere, that there should be either a loan of money, or forbearance of a debt actually due. And in support of this position it is urged that this construction has been placed by the Supreme Courts of Indiana and Iowa upon the statutes of their respective States, which are conceded to be equally as broad and unlimited as that of Alabama; and we are cited to *Crawford v. Johnson*, 11 Ind., 258; *Borum v. Fouts*, 15 Ind., 50; *Newkirk v. Borson*, 21 Ind., 129; *Burrows v. Cook*, 17 Iowa, 436.

It must be admitted that these cases are in point and do sustain the position. But counsel could not have been aware of the fact that, so far as they do sustain his position, they have in later cases, by the same Courts, been expressly overruled. The Indiana statute came up for construction before the Supreme Court of the United States in *Hogg v. Raffner*, and it was held that by the peculiar terms of the statute the common law definition of usury was not enlarged, but that the intent was to include the common devices resorted to by usurers to evade its penalties.

Mr. Justice Grier, delivering the opinion of the Court, said:

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“To constitute usury there must either be a loan and a taking of usurious interest, or the taking of more than legal interest for the forbearance of a debt or sum of money due. * * * But it is manifest that if A propose to sell to B a tract of land for \$10,000 in cash or \$20,000 payable in ten annual installments, and if B prefers to pay the larger sum to gain time, the contract cannot be called usurious. A vendor may prefer \$100 in hand to double the sum in expectancy, and a purchaser may prefer the greater price with the longer credit; and one who will not distinguish between things that differ may say with apparent truth that B pays a hundred per cent. for forbearance, and may assert that such a contract is usurious; but whatever truth there may be in the premises, the conclusion is manifestly erroneous. Such a contract has none of the characteristics of usury. It is not for the loan of money or forbearance of a debt.” 1 Black., 118, 119.

He does, however, politely suggest a ground upon which *Crawford v. Johnson*, 11 Ind., may be distinguished.

The point subsequently came up for decision before the Supreme Court of Indiana, in *Newkirk v. Borson*, and Ray, Judge, delivering the opinion of the Court, quotes the above passage from the opinion of Mr. Justice Grier, and adds:

“If this position be correct, it cannot be of any importance at what times and in what amounts the payments upon a credit sale of land are made;

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and it may not be clear even to those who can 'distinguish between things that differ' how the learned Judge could in that opinion endorse the case of *Crawford v. Johnson*, 11 Ind., 258, unless indeed it be assumed that in that case the sale of the land had been completed at a fixed price for cash, and that time was subsequently given, and illegal interest exacted for the forbearance. The same is true of the case of *Borum v. Fouts*, 15 Ind., 50, and except upon the assumption of a completed contract of sale for a fixed price, and a subsequent forbearance at an illegal rate of interest, these cases are not, in our opinion, consistent with the law as stated, we think accurately, in *Hogg v. Raffner, supra.*" 28 Ind., 440.

In like manner the same point came before the Supreme Court of Iowa, subsequently to *Borrows v. Cook*, cited by counsel, and it was held that such contracts are not usurious, not being within the statute. The learned Judge who delivered the opinion of the Court, however, remarked:

"Of course if such contracts are resorted to as a cover for usury—to evade the usury laws—they will be held usurious. * * * For if the contract is in truth and fact a loan of money at usurious rates, it matters not what devices may be resorted to for the purpose of covering or concealing its true character, the law will strip from it these devices and adjudge it by what it is in fact rather than by what it may in its terms appear to be." *Gilmore v. Ferguson*, 28 Iowa, 223, 224.

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If, then, as argued by counsel, and as we believe to be true, the statutes of Indiana and Iowa are substantially the same as the statute of Alabama the cases cited are strongly persuasive of the construction which we should place upon the latter, and the more so because of its simplicity and ease of application.

In the absence, then, of any authoritative decision by the Supreme Court of Alabama, this Court is content to hold that in Alabama, as in Indiana and Iowa, the loan of money or the forbearance of a debt actually due, at illegal rates of interest, is essential to constitute usury.

In this view of the statute, the question presented is of easy solution. It is not pretended that Vasser desired to lend Gardner money at usurious rates, and resorted to the device of a sale of his plantation and negroes to accomplish his purpose, nor is it pretended that a *bona fide* sale was made for the consideration of \$40,000, and that subsequently it was agreed to give credit at usurious rates of interest.

The Court is of opinion that there is no usury in the contract.

And lastly, under the state of facts as disclosed by this record, the Court is of opinion that the defendant is not entitled to the benefit of the equitable set-off relied on. It is manifest that the negroes, having been mortgaged in Tennessee to a trustee residing there, to secure the debt due

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Vasser, Gardner had no right to remove them beyond the jurisdiction of that State. In opposing the removal, and in stating the facts to the negroes, Vasser seems clearly not to have passed beyond the bounds of his rights. No ground is perceived upon which to predicate a conversion. The slaves returned with Gardner to the plantation, and remained for some time in his possession and under his control. That they were lost sooner than otherwise they would have been is mere matter of speculation. Upon the whole it is impossible to resist the conclusion that if any loss accrued to Gardner in consequence of the acts of Vasser, as set out in the agreement copied into the record, it was *damnum absque injuria*, and furnishes no ground for equitable set off.

The decree of the Chancellor is affirmed, with costs.

Ricketts v. Ricketts.

4L 163
13L 158MARY J. RICKETTS, Admx., etc., v. THE HEIRS AND
CREDITORS OF S. S. RICKETTS, Dec'd.

1. **LIMITATION.** *Administrators. Request for delay.* Request for delay to sue by an administrator of a creditor on demand must be for a *definite* time at his special request. It must be for a time so definite or capable of being rendered so by proof that the Court or jury can count out the time of delay requested.
2. **SAME.** *Same. Same.* The better practice is to endorse the request on the evidence of the debt, with the time agreed upon, so that the time may readily be counted out of the period of limitation.
3. **SAME.** *Same.* An acknowledgement of the correctness of the debt, and a promise by the administrator to pay as soon as he could get the money, or as soon as assets came into his hands, is not a *special* request, nor for a *definite* time, and will not prevent the bar of the statute of limitations.

FROM WAYNE.

Appeal from Chancery Court at Waynesboro.
G. H. NIXON, Ch.

G. T. HUGHES, for Complainants.

PITTS & Cox, for Defendants.

FREEMAN, J., delivered the opinion of the Court.

This is an insolvent bill filed by the administratrix. The facts necessary to be stated here are, that Mrs. Ricketts was appointed administratrix, Au-

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gust, 1865. She appointed John M. Benham her general agent to act for her in the settlement of all the business. She, in fact, was but the representative nominally and legally, her said agent doing all the business for her and representing her.

The administration proceeded for some years under the impression that the estate was solvent. Debts were paid and real property sold for this purpose. Owing to failure in collecting certain assets of the estate, which had been deemed good, it ultimately turned out that it was deemed necessary to suggest the insolvency of the estate, which was done to the Clerk of the County Court of Wayne county, September 24th, 1870, and publication made for all creditors to file their claims on or before the 1st of May, 1871, or, in the language of the order, "the same would be forever barred."

The administration proceeded in the County Court until the 20th day of May, 1872, when this bill was filed, transferring the administration to the Chancery Court. In this bill several debts are admitted to be due. The Ricketts claim, now in contest, is stated to be a decree rendered against her, as administratrix, March, 1872, for \$2,063.63, and the parties claiming under said decree, with others whose claims are not involved in this record, are made defendants by name to the said bill, and process prayed against them. The usual order for creditors to file their claims was made, the time fixed being the first Monday in January, 1873. An injunction was prayed for by this bill restraining all parties

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from bringing suits or further proceeding to enforce their claims, except under the order of the Court in this case. The respective parties appellant in this case, to-wit, Weeks, Hughes, Ricketts and Bell, filed their claims, having been made parties to the proceeding by petitions. An order of reference was had to the Clerk and Master to report on the amount of assets and liabilities of the estate, their debts being reported as valid claims for allowance. Thereupon exceptions were filed, both by the creditors, the heirs to some of the claims, and complainant, the administratrix.

The exception of the administratrix will be first noticed.

The exception to the claim of Hughes & Bro. is based on lapse of time, stating the facts, as to death, grant of letters of administration in 1865, suggestion of insolvency in 1870, filing the insolvent bill in 1872, averring that the claimant did not file the claim in the time required by law. The exception then specifies failure to bring suit in two years and six months from appointment of the administratrix, nor was the same filed within that time, and also that it was barred by the statute of six years.

The Hughes claim is as surviving partner of Hughes & Bro., and is a note given by the intestate, January 18th, 1862, due one day after date, for \$300.00, payable to Wanington, and by him endorsed to them. This note is said, in Hughes' petition, to have been filed in the County Court,

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with the Clerk, during the pendency of the administration there, and his receipt taken for the same.

The claim must stand here entirely on the proceedings and proof in the Chancery Court, as we see no evidence of what, if anything, had been done in the administration in the County Court, nor whether the claim had been allowed or not, and besides, it could not have been filed there in time, the insolvency having been suggested September, 1870.

It is clear from the facts, that this claim is barred by the statute of two years and six months—Code, sec. 2279—in favor of personal representatives, unless saved by a new promise or request for delay, as provided for by sec. 2280. Under the first section, the party must make demand and bring suit within the two years and six months, or be forever barred. But by the second section referred to, (2280) if “on making demand the creditor” delay to bring suit for a *definite time*, at the special request of the executor or administrator, the time of such delay shall not be counted in said period of limitations. The case is attempted to be made out under this section as against the administratrix.

The case made by the proof, taking the statement of the claimant, (there being no exception in the record to his competency) is about this: That when he bought the note, he called on Benham,

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the agent, who told him he had no money on hand, but just as soon as he could make collections he would pay. At another time, he spoke of suing on the claim, when Benham told him there was no use, as soon as he got the money he would pay it off.

Benham, the agent, does not make the case quite so strong. Says he told Hughes, as he did every other creditor, that he would pay as soon as he could get the money to pay with. And, we take it, this is about the truth of the case, the estate being deemed amply solvent by the creditors.

Some of our cases have certainly gone far towards an unjustifiable extension of this statute in preventing the bar of the statute. For instance, in the case of *McKizzock & Co. v Smith*, 1 Sneed, the case was reversed because the Circuit Judge charged that "a request for delay until the representative can collect money is not a special request or a sufficiently definite time," the Court holding the contrary. It might be difficult, it seems to us, to see how, on such a promise, the party could recover, in such a case, unless he could show the fact that money sufficient to pay had been collected. This is all the promise means, by any fair construction of the language.

But, passing by this, such a request for delay does not meet the requirement of the statute, that the "delay to bring suit shall be for a definite time, at the special request of the administrator." Definite means certain, fixed. At what time an

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administrator can collect money to pay a debt out of the assets of an estate is certainly as indefinitely and unfixed a period as can well be conceived. Practically, no one can tell when this can be done, nor as a matter of law, under our system, is it any more certain

In the case of *Chesnutt, admr., v. McBride*, 2 Heis., 392, the cases on the subject are reviewed by Judge Nelson, and the intimation very clearly made, that some of our cases had gone beyond what the statute would permit in allowing debts to be saved from the operation of the statute as on a request for delay. It was held in that case that where demand was made in December, 1868, and delay *requested* at said date, was not sufficient to stop the statute; and also where the demand was made, and the administrator replied, "hold on, your claims are good," will not save the bar of the statute

The principle of the statute is fairly expressed by Judge Reese in the case of *Trott v. West*, 9 Yer., 435, that the suit, after demand is made, must be delayed by the request of the administrator, not vague, not indefinite, not to be implied or inferred merely, but special, and that special request shall stipulate for a definite time of indulgence, during which the statute shall not bar the claim.

We add to this rule, that a request for delay for a time capable of being rendered certain, might fairly be included under the language of the statute, as until the happening of some certain event,

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as until a certain tract of land was paid for, or a settlement was had with another claimant on the estate: *Puckett v. James*, 2 Hum., 366. But in such case the time thus requested should be ascertained in the proof in the record, so as to be counted out of the period of limitation as required. This must be adhered to as the only fair meaning of the statute, or else it is equivalent to rendering its provisions nugatory. They are plain that the request for delay, on making demand, shall be for delay in suing for a *definite* time, at the special request of the representative, and then, that "*the time of such delay (so requested) shall not be counted in said period of limitations.*" It must, then, be a time so definite, or capable of being rendered so, and this done by the proof, as that the Court or a jury can count out the time of delay requested.

The proof shows in this case no request for any delay, but only a promise to pay when he could make collections—just the same promise as Benham proves that he made to every creditor, that is, he would pay as soon as he could get the money; in other words, that he would do his duty in the premises, and pay out and appropriate the assets as fast as received. This cannot be held a request for delay, nor for a definite time, or one capable of being rendered certain. Sure it is not rendered so certain in this case that we can see how much time of delay shall be counted out of the period of limitations. How much time shall

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be counted out under these facts? Shall it be six months, twelve, or until the debt is in fact paid? We are totally unable to see. The sounder policy, by far, is to adhere to the plain meaning of the statute, and require a definite time agreed on for delay by the one party at the request of the other. The practice will soon be, under the advice of counsel, to endorse the request on the evidence of the debt, with the time agreed on, or a written memorandum will be made of such time, and then we will have definite evidence of what was agreed on by the parties, and the time thus agreed on can readily be "counted out of the period of limitation," as the statute provides, thus making a rule and practice, certain, satisfactory, and beyond question, and at the same time easy and convenient to be pursued.

This claim cannot be allowed.

The same principle excludes the claim of Annie G. and Jane Bell. This is attempted to be supported by two endorsements made on the account by Benham, the agent of the administratrix.

The first is: "The above account is hereby recognized as true and unpaid." This was February 20th, 1860.

The other is: "The following account has been duly presented, which I acknowledge to be correct as stated, and which is due and unpaid, and I agree to pay the said amount as soon as assets come into my hands." No suit has ever been brought on this account.

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There is no request for delay for any period in either of these entries; only a promise to pay as soon as assets came into his hands. This, as in the other case, is nothing more than a promise to do his duty, and pay when he got the assets in his hands. If this is to be held a request for delay for a definite time, and to bind the estate, it would be impossible for a representative to fail to bind the estate, unless he should say, on demand made, that he would not pay even when the means came to his hand. It cannot be that this statute can thus be construed fairly.

The case of Weeks goes under the same principle. We cannot see any definite time of delay, though the attorney proves it was for a definite time, but he has forgotten the length of time agreed on. Nor is the promise to pay out of certain claims in the hands of one Grimes any more certain. The promise to pay money to be collected from one Minor was to pay at a certain time, but what that time is we are unable to see, so that the time could be counted out.

We must hold this claim unsustained and barred by the statute of limitations.

Another small claim seems to have been appealed from, but we see nothing in it, and think the Chancellor correctly ruled on it.

The claim of W. L., T. R. and S. B. Ricketts was disallowed by the Chancellor. It is a decree made by the Chancery Court against the adminis-

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tratrix, on bill filed against her, and rendered March term, 1872. Its correctness is admitted in the bill.

We need but say that the decree is final as to the personal representative, and beyond question binds the personalty in her hands.

This claim should have been allowed. There being no exception to this claim on the part of any representative of the realty, we need not consider the effect of a judgment or decree against the personal representative as against the realty descended to the heirs.

These are all the questions, we believe, fairly raised on this record, or that demand our attention.

A decree will be drawn in accord with this opinion, the costs to be paid out of the funds realized.

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JOHN LAWLESS v. THE STATE.

4L	173
8L	309
10L	416
14L	163

4L	173
117	458
117	467

1. **CRIMINAL LAW. Indictment. Plea in abatement.** A plea in abatement to an indictment filed by the District Attorney without a prosecutor, by order of the Court, under the Code, sec. 5097, sub-sec. 9, that no witnesses were examined or proof taken by the Court that an indictable offense had been committed, is fatally defective, even if such plea will lie at all.
2. **SAME. Same. Different counts.** Where an indictment contained three counts, one for assault with intent to commit murder in the first degree, another for assault with intent to commit murder in the second degree, and the third for assault with intent to commit manslaughter, motions to quash the indictment and to compel the Attorney-General to elect upon which count he would proceed to trial, were properly overruled.
3. **SAME. Same. Amendment.** Upon an application to recommit an indictment to the grand jury for amendment, it is not necessary to mention the proposed amendment, and a return of the indictment by the grand jury in open Court, with an endorsement on the back, signed by the foreman, showing the amendments made in the indictment, and with the usual endorsement as a true bill of the amended indictment, would be good.
4. **SAME. Practice. Recalling witness.** It is in the discretion of the trial Court, after one of the defendant's witnesses has been examined, to permit the Attorney-General to recall the witness, and ask a question with a view to contradict the witness.
5. **SAME. Reasonable doubt.** A reasonable doubt as to any material element of a crime, or any fact essential to the defendant's guilt, will enure to his benefit.
6. **SAME. Same. Instructions.** In the absence of any special request for a further charge, it may be sufficient to say to the jury that they should acquit if the proof fails to satisfy their minds fairly and fully of an essential fact, but the defendant is entitled if he demands it, and the Court should give him the benefit of it without a demand, to the explanation that to fully satisfy the mind it must rest easy in the conclusion reached, or be satisfied of its truth beyond a reasonable doubt.

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7. **SAME.** *Same.* Where a conviction is sought upon circumstances alone, the defendant, if he demands it, is entitled to the charge that the circumstances must be so strong, and well connected, as to exclude every other reasonable hypothesis but that of his guilt.

FROM SUMNER.

Appeal in error from the Circuit Court of Sumner County. J. C. STARK, J.

C. R. HEAD and LEE HEAD, for Lawless.

Attorney-General LEA, for The State.

COOPER, J., delivered the opinion of the Court.

The plaintiff in error was convicted of an assault with intent to commit murder in the second degree, and appealed in error.

An indictment was found against the prisoner at the February term, 1879, of the Circuit Court of Sumner County, upon which he was brought into Court by a *capias* returnable to June term.

On the 30th of June, the Attorney-General, with the consent of the Court, entered a *nolle prosequi*, but the prisoner was directed to be retained in custody until another indictment could be found. The following order was then made and entered on the minutes of the Court:

"It appearing to the Court, from proof, that an indictable offense has been committed in said county, and that John Lawless is accused with the commission thereof, and that no one will be prose-

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cutur, it is therefore ordered by the Court that the District Attorney-General file an indictment officially."

An indictment was thereupon found by the grand jury, containing three counts, one for an assault with intent to commit murder in the first degree, another for an assault with intent to commit murder in the second degree, and the third for an assault with intent to commit manslaughter, each being obviously for the same assault on the same person.

The defendant filed a plea in abatement, to the effect that no witnesses were examined nor proof taken by the Court that an indictable offense had been committed.

This plea was, on motion of the Attorney-General, stricken from the files, and the action of the Court is now assigned as error.

By the Code, sec. 5097, sub-sec. 9, a prosecutor is dispensed with, and the District Attorney may file a bill of indictment upon an order of the Court to file it officially, which order may be made "when it appears to the Court" that an indictable offense has been committed, and that no one will be prosecutor. Previous to the Code, the discretion of the Court was limited by the Act of 1842, chap. 65, to cases where the Judge might be satisfied from the examination of witnesses in open Court. Even under this statute a general order like the one in this record was held sufficient, the presumption being that the Court

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had done its duty: *Simpson v. State*, 4 Hum., 456; *Bernett v. State*, 8 Hum., 123.

The Code drops this limitation, and allows the exercise of the discretion, "when it appears to the Court" that an offense has been committed. It is clearly not necessary that the facts should appear by the examination of witnesses in open Court, nor by proof formally taken. It would be sufficient if the Court acted upon its own knowledge, or, as in this case, upon the fact that an indictment had actually been found against the defendant at a previous term.

In this view, the plea which fails to negative these sources of knowledge was clearly bad, and it may be doubted whether any plea at all will lie to the exercise of so discretionary a power.

The defendant next moved the Court to quash the indictment because it charged three distinct offenses in three several counts, for each of which a different punishment is prescribed. This motion being overruled, the defendant moved that the Attorney-General be compelled to elect upon which count he would put the defendant on trial, which motion was also overruled. These rulings are assigned as error.

But it has long been settled in this State, in accord with authority, that different offenses, punished by different degrees of severity, differing only in degree, and belonging to the same class of crimes, may be united, and it is not error in the Court below to refuse to quash for this reason, or

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to compel the prosecutor to elect on which of the charges he would proceed: *Hampton v. State*, 8 Hum., 69; *Cash v. State*, 10 Hum., 111. *A fortiori*, where the offense is the same, the several counts being inserted to meet the uncertainty of the evidence: *Boyd v. State*, 7 Cold., 77; *Wright v. State*, 4 Hum., 194; *Hall v. State*, 8 Lea, 559.

The assault in the present case was one, but it was uncertain whether the evidence would make out the higher or lower grade of offense: Code, sec. 5121. The doubt in such case was whether a single count for the highest grade would, under the Code, sustain a verdict for either of the lower grades. This doubt was resolved in the affirmative in *Smith v. State*, 2 Lea, 614. But there never was any doubt that separate indictments or counts would lie for each grade under the Code, sec. 4630: 2 Lea, 617.

The defendant having been arraigned, pleaded not guilty, and the cause was continued, upon application of the Attorney-General, to the next term. Afterwards, at the same term, [upon application of the Attorney-General, leave was granted him, over the exception of the defendant, to recommit the indictment to the grand jury for amendment. It was afterwards returned into Court by the grand jury endorsed thus: "This indictment, on being recommitted to the grand jury, is amended by inserting 'with a gun' in three places after 'Louisa Osborn' in each count. F. A. Taylor,

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Foreman Grand Jury. A true bill. F. A. Taylor, Foreman Grand Jury."

It is now objected that the motion to recommit does not mention the proposed amendment, and that the amendment being material, it was equivalent to a new indictment, and required the same formalities of submission to the grand jury—examination of witnesses and return into Court.

The record does show that, after the recommitment, the grand jury returned into open Court in a body the amended indictment, showing that it had been amended by them, and in what respect.

It is not required that the amendment should be mentioned in the application. Nor does it seem necessary to go through all the formalities, even when new counts are added, if done by the Attorney-General: *Hite v State*, 9 Yer., 198, 203. And for aught that appears, the same witnesses marked on the indictment were re-examined.

After one of the defendant's witnesses had been examined, the Court permitted the Attorney-General to recall the witness and ask her a question, with a view to contradict her. It is clear that the recall for this purpose did not make the witness the witness of the State, and the permission was one of those matters entrusted to the discretion of the Judge below which this Court cannot revise.

In his charge, after defining the ingredients necessary to constitute the crime of assault with intent to commit murder in the first degree, the Judge added: "If the proof satisfies your mind

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fairly and fully, and beyond reasonable doubt, as it is sometimes called." The latter words cannot be seriously treated as error, for they do not qualify the material part of the charge—that the proof should satisfy the minds of the jury beyond a reasonable doubt. It is advisable, however, for the Circuit Judge to adhere strictly to the old and well settled formulas of the law, for then he is certain to be right "beyond a reasonable doubt." Any departure from the beaten track will inevitably lead to doubt and uncertainty. No exception can be fairly taken to this part of the charge, nor to the corresponding paragraph which follows the definition of assault with intent to commit murder in the second degree.

When his Honor comes to charge upon the venue, he tells the jury: "The proof must satisfy your minds fairly and fully that it was committed in the County of Sumner."

So, when he charges on the subject of insanity, he says: "You should take the whole body of the proof together, and if it fails to satisfy your minds fairly and fully of the soundness of the memory and discretion of the defendant, you should acquit."

So, when he comes to speak of crime being established by circumstances, he says: "It is not necessary that a fact or crime should be proved by positive proof or eye witnesses. It may be proved by circumstances, but when sought to be proved by circumstances, they must be so linked together as to make a perfect chain; no link must

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be left out; and it must satisfy the mind *fully* of the truth of the proposition it is intended to establish."

The defendant specially requested the Judge to charge, in relation to the venue, that the jury must be satisfied "beyond a reasonable doubt" by the proof that the crime was committed in the proper county before they can convict. The defendant also specially requested the Judge to charge upon the question of insanity, "that if the jury have a reasonable doubt upon the soundness of the prisoner's mind at the time of the commission of the offense, they must acquit." So, upon the proof of the crime by circumstances, the defendant requested the Court to charge, "that if the jury have a reasonable doubt as to the existence of proof of any fact constituting a link in the chain of circumstances necessary to show the commission of the offense, they should acquit." The defendant further asked, in this connection, the following charge: "That if there was no positive proof of defendant's guilt, but a conviction is asked upon circumstances alone, that such circumstances must be so strong, and well connected, as to exclude every other reasonable hypothesis but that of his guilt." These charges the Judge refused to give.

It is a rule of the criminal law that the guilt of the accused must be fully proved. No weight of evidence is sufficient for the purpose unless it generates full belief of the fact to the exclusion of all reasonable doubt: 3 Greenl. Ev., sec. 29.

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And a reasonable doubt as to any material element of a crime, or any essential fact, will enure to the prisoner's benefit. As, for example, doubt of the malice necessary to constitute murder: *Coffee v. State*, 3 Yer., 283; of the sanity of the prisoner: *Dove v. State*, 3 Heis., 348, 367; in relation to the proof of an alibi: *Chappel v. State*, 7 Cold., 92. The prisoner is therefore entitled to have the law in this regard properly charged. This may be done by expressly telling the jury that they should be satisfied beyond a reasonable doubt—a phrase well understood, although not easily defined: *Commonwealth v. Webster*, 5 Cush., 320. It may, no doubt, be sufficiently expressed in other language conveying the same meaning. It has been held by this Court that if the Judge say to the jury that the evidence must show the guilt of the defendant to their reasonable satisfaction, that their best judgments must be that the defendants are guilty, so that the mind may rest easy in the conclusion of guilt, it is equivalent to a charge that the State must show that the parties are guilty beyond all reasonable doubt: *Purkey v. State*, 3 Heis., 27.

The learned Judge in the present case undoubtedly intended to conform his charge to the requirements of the law. The mind that is "fully satisfied" of the truth of a fact may be considered as satisfied beyond a reasonable doubt. So if the Judge had charged that the fact must be "fully proved," the words might fairly imply the same character of proof. And in the absence of any spe-

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cial request for a further charge, the charge in any of these forms might be good. But the defendant is entitled, if he demands it—and the Court should give him the benefit of it without a demand—to have an explanation of the words “fully proved” or “fully satisfied.” A fact is not “fully proved” in a criminal case unless the evidence generates full belief of the fact to the exclusion of all reasonable doubt. To “fully satisfy” the mind, the mind must rest easy in the conclusion, or be satisfied beyond a reasonable doubt. These latter words have long since, where used in a criminal case, acquired a meaning which it is dangerous to seek to supply by any other form of expression. In like manner, the charge asked for in relation to circumstantial evidence is the well recognized form of explaining the strength of circumstances necessary to “fully satisfy” the mind of the jury in such cases: *Smith v. State*, 2 Leg. Rep., 56.

The defendant was entitled to the charges asked for, and the Judge erred in refusing to give them.

The judgment must be reversed and the cause remanded for a new trial.

State v. Farria.

THE STATE v. FANNING FARRIS

Where a misdemeanor case is stricken from the docket under the Code, sec. 5193, the County Attorney-General, Sheriff, Clerk, and State's witnesses are entitled to their fees, incurred on behalf of the State, as in case of *nolle prosequi* or acquittal, to be taxed against the county.

FROM PUTNAM.

Appeal in error from the Circuit Court of Putnam County. N. W. McCONNELL, J. ;

Attorney-General LEA, for The State.

No counsel marked for defendant.

COOPER, J., delivered the opinion of the Court.

The defendant having been indicted for a misdemeanor, two writs of *capias* were issued at different times, upon each of which the Sheriff made return that the defendant was not to be found and had left the State. The Court thereupon, on motion of the Attorney-General, struck or retired the case from the docket, under the Code, sec. 5193. The Attorney-General then moved for judgment against the county for his own fee and the fees of the Sheriff, Clerk and witnesses, which had ac-

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State v. Farris.

crued in behalf of the State, as upon an acquittal of the defendant.

The Circuit Judge overruled the application, and the Attorney-General, Sheriff, Clerk and witnesses appealed.

Section 5193 of the Code is in these words: "When a *capias* has been returned not to be found and in felony cases when, before or after conviction, the defendant breaks jail, or forfeits his bond for appearance, the Court may strike the cause from the docket, and give judgment against the State for such costs as the State is bound to pay in case of *nolle prosequi* or acquittal of the defendant."

Looking alone to the general intent disclosed by this section, without literally interpreting the language used, it would seem clear that when the Court strikes a case from the docket, in compliance with its direction, it should give judgment for the costs as in case of *nolle prosequi* or acquittal. The words are, "give judgment against the State." Literally, these words may be construed as meaning that no judgment can be rendered except where the State is liable for the costs. But, in that view, there would be no provision for the costs in misdemeanor cases, where the *capias* has been returned not to be found, and the Court strikes the case from the docket. For, long before the Code, and as early as the Act of 1827, ch. 36, costs in criminal prosecutions for misdemeanors were paid by the county, not the State. This provision

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State v. Farria.

of the statute law was brought into the Code sec. 5587. The words in controversy, by a fair construction, may be treated as referring to the State as the only party to the record except the defendant, and directing the judgment to be rendered against the State nominally for its costs, but to be paid by the county whenever chargeable to it according to law. This section of the Code must be construed in connection with sections 5585-6-7, being in *pari materia*, and parts of one Act. Reading them thus together, it seems clear that it was never intended to leave a large class of cases in which the officers of the law and witnesses for the State are required to perform services without compensation.

The case of *State v. Ellis*, 6 Baxter, 549, is in conflict with this conclusion, but, upon careful consideration, we think it was erroneously decided, and overrule it.

The judgment will be reversed, and judgment rendered in favor of the appellants against the County of Putnam.

Terry v. Clark.

E. W. TERRY v. JOHN CLARK et als.

SUPREME COURT. *Jurisdiction. Writ of possession before hearing.*

The Supreme Court has no jurisdiction to award a writ of possession on a decree of the Chancery Court, nor on its own order, except after a hearing and decision on the merits.

FROM PUTNAM.

Application for writ of possession.

COOPER, J., delivered the opinion of the Court.

The original bill was filed by Terry against Clark and Baldwin and wife, to enforce the vendor's lien on a tract of land sold by Baldwin and wife to Clark, for the satisfaction of one of the notes of Clark given for the purchase money, which had been assigned by Baldwin and wife to complainant.

Clark answered the bill, filing his answer as a cross bill, and stated that he had bought the land in good faith, under the representations of Baldwin and wife that the title was good, had paid a large part of the purchase money, and made valuable improvements. He averred that Baldwin and wife had no title, by reason of a defective conveyance

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from J. B. Terry and Amanda, his wife, under whom Baldwin and wife claimed, and for other reasons. He stated also that Peyton Pearson and Tilman Pullen each held one of the notes given for the purchase money of the land, on which he had made payments. In addition to the original parties to the suit, he made Terry and wife, Pearson and Pullen defendants, and asked that the title to the land be perfected, and if this could not be done, that the sale be rescinded, and he be repaid his purchase money and the value of his improvements.

Baldwin and wife, together with Pearson, answer Clark's cross bill, and file the answer as a cross bill against Terry and wife. Baldwin and wife admit representing to Clark that they had a good title, and say they thought they had. They are willing to acknowledge the title bond to Clark in due form, and seek to perfect their title by the cross bill against Terry and wife. Pearson asks that his note be paid if the land is sold.

Pullen answers Clark's cross bill, and files his answer as a cross bill against all parties, to enforce his lien for the payment of the purchase note held by him.

The Chancellor dismissed the original bill, and the cross bills of Baldwin and wife, Pearson and Pullen, and rescinded the sale to Clark, upon his cross bill, giving him a decree for his payments and improvements, which were made a lien on the land. There was a reference to take the

Terry v. Clark.

necessary accounts, and the Court directed a writ of possession to issue to put Baldwin and wife in possession of the land, subject to Clark's lien.

From this decree "complainant prays an appeal, which to him is granted upon his giving bond," etc.

All the complainants in the original and cross bills, except Clark, seem to have construed this prayer to include them, and they join in the appeal bond.

At the last term, Baldwin and wife and Pearson seem to have dismissed their appeal, and Baldwin and wife obtained an order that a writ of possession issue from the Chancery Court to put them in possession of the land.

The Clerk and the Chancellor decline to issue the writ, and an application is now made that the writ issue from this Court.

The order at the last term was made upon the suggestion of counsel that the failure of Clark to appeal, and the dismissal by Baldwin and wife of their appeal, left the decree of the Court below, as between Baldwin and wife and Clark, in full force.

In that view, if correct, the applicants, Baldwin and wife, were entitled to apply to the Chancery Court for a writ of possession without any order of this Court. Nor is it seen how this Court could make any order in the premises. If the appeal of Terry and Pullen vacated the decree of the Chancery Court, and brought the whole litiga-

• Terry v. Clark.

tion into this Court for a trial *de novo*, then it is very clear that this Court would have no power to order a writ of possession to issue in favor of one of the parties without a decision of the cause in favor of that party on the merits. The writ of possession is only the execution of the final decree. If, on the other hand, the case is not brought up to this Court by the appeal as between Baldwin and wife and Clark, it remains in that Court, and the decree can only be executed there. This Court clearly has no jurisdiction to execute a decree of the Chancery Court. In either view, therefore, we have no power in the premises.

The order of the last term was improvidently made, and must be rescinded, and the present application refused.

Allen v. Harris. •

4L 190
10L 392
16L 139

ALICE W. ALLEN v. JOEL W. HARRIS et als.

SUPREME COURT. *Application for a receiver.* An application to this Court for a receiver, based upon the same facts on which the Chancellor had refused a similar application, cannot be entertained.

FROM LINCOLN.

Appeal from Chancery Court of Lincoln County.
JOHN W. BURTON, Ch.

LAMB & TILMAN for Allen.

J. W. NEWMAN for Harris.

Motion to appoint receiver.

COOPER, J., delivered the opinion of the Court.

The defendants, Harris and Alexander, claim the house and lot in controversy, under a deed executed on February 26, 1875, by E. L. Allen and Alice W., his wife, reciting a consideration of \$2,000. On the same day, Harris and Alexander agreed in writing that Allen and wife, or either of them, might repurchase the property within eighteen months by the payment of the purchase price, with interest, taxes and insurance.

After the expiration of the time specified, Harris and Alexander brought ejectment for the land.

Allen v. Harris.

Pending the action, on the 7th of March, 1877, Allen died, leaving his wife and three children surviving.

This bill was filed by the widow against Harris, Alexander and the children, to enjoin the prosecution of the ejectment, and claiming dower and homestead in the lot, upon the ground that the conveyance of February 26th, 1875, was only a mortgage, and did not purport to convey the homestead

On the hearing, the Chancellor was of opinion that complainant was not entitled to the relief sought, and decreed accordingly. The complainant prayed an appeal, which was granted.

On the day before the appeal was perfected, Harris and Alexander filed a petition sworn to by one of their solicitors, asking for the appointment of a receiver of the property in dispute, upon the allegations that the complainant was insolvent, and was not in the actual occupation of the property, but only receiving the rents from a tenant. It was added that petitioners did not "believe the property worth the amount of money already paid by them for it."

The Chancellor refused the application, and from his order to that effect the petitioners appealed.

If the present application is to be considered as a mode of asking the Court to revise the action of the Court below in refusing to appoint a receiver, it cannot be entertained.

Allen v. Harris.

A party is entitled to only one hearing on an appeal: *Hume v. Commercial Bank*, 1 Lea, 220. We cannot undertake to act separately upon each error which the Court below may be supposed to have committed: *Scoggins v. Cowden*, 1 Lea, 184. The ruling of the Chancellor can only be revised when the cause comes to be heard upon the appeal.

If the application is intended to be a new one, without reference to the action of the Chancellor, there is nothing to support it except what may appear in the record, and to act upon that would be to try the case and revise the action of the Chancellor. A new affidavit repeating the facts stated in the affidavit below would not change the result, and an affidavit of new facts which have since occurred would be to require us to exercise original, not appellate jurisdiction.

The application must be disallowed.

Litterer v. Berry.

WILLIAM LITTERER, Surviving Partner, etc., v. W. W.
BERRY, Trustee.

41 193
101 23

1. RENTS. *On mortgaged property.* Rents accruing upon property conveyed to a trustee for the benefit of creditors, between the execution of the deed and sale, in the absence of a contrary disposition, are the property of the conveyor.
2. SAME. *Set off.* If, however, past due rents are conveyed which were subject to set off by a debtor in a suit by the conveyor, they will be subject to the same set off when demanded by the trustee.

FROM DAVIDSON.

Appeal in error from the Circuit Court of
Davidson County. N. BAXTER, J.

THOS. L. DODD and M. M. BRIEN, Jr. for
Litterer.

DEMOSS & MALONE, for Berry.

TURNER, J., delivered the opinion of the Court.

A. L. Davis, being indebted to W. W. Berry and others, on the 31st of December, 1869, made to Berry, as trustee, a deed of trust to twelve-sixteenths of a house and lot in the city of Nashville, with the provision that "W. W. Berry, as trustee, may, at any time he shall see proper, sell said land for cash, or on credit, on thirty days'

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notice, and apply the proceeds to the payment of the notes aforesaid or to the indemnity of the endorsers aforesaid," etc.

On the 4th of February, 1871, A. L. Davis made another deed in trust, by which he directed Berry, trustee, to take possession of the real estate conveyed in the first, rent it out, collect the rents, and collect any past rents that may be due on the same, that Davis may be entitled to, and apply the rents or hold them just as he holds the *corpus* of the property.

At the time of and before the making of these deeds, Davis was indebted to Litterer & Cabler, by judgment, in a large amount, and Litterer & Cabler were indebted to him by a considerable amount for rent of the property, and had, as it seems, contracted to rent it for the year 1871, before the making of the deed of February 4th of that year, and were claiming to off-set their judgment by the rents, of which the trustee had notice. In fact, it seems the second deed was taken by the trustee because of the claim of set-off by Litterer & Cabler.

A deed of trust, with a provision that the trustee may, whenever he shall see proper, sell the land and apply the proceeds to the payment of debts, does not give to the trustee, as of course, the right of immediate possession. He is only entitled to the possession when he shall see proper to sell under the terms of the deed. The rents accruing between the execution of the deed and

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sale, in the absence of a contrary disposition, are the property of the conveyor.

The second deed authorizes the collection of past due and future rents, gives to the trustee just such right as his vendor had, and no greater. If the rents were subject to set-off by a debtor in a demand at the suit of the vendor, they will be subject to the same set-off when demanded by the trustee.

If at the time of the execution of the second deed there had already been made a contract of renting for the year 1871, between Davis, the owner, and Litterer & Cabler, the trustee would not be entitled to the possession of the property until the expiration of the time for which it had been rented, and the rent contracted to be paid to Davis would be subject to set-off by Litterer & Cabler by the amount due to them from Davis.

In *Gatewood v. Denton*, 3 Head, 381, Judge McKinney says, construing sec. 2918-4 of the Code, "The provision, it seems to us, embraces the present case. At the time of the assignment of the note to the plaintiff the defendant had a well founded right of action against the assignor for an amount larger than the sum due upon the note, for money paid as his security, which he might have recovered by action of debt, or assumpsit, or by motion. The right thus existing had, in the language of the section just quoted, attached itself to the note before its transfer to the plaintiff, or, in other words, the right of set-off or cross action

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was fixed and complete in the defendant previous to and at the time of the assignment of the note, and could not have been resisted by the original party, the assignor. And this is all that is requisite to entitle the defendant to a set-off against the plaintiff, who, by taking the note after it was due, holds it subject to every equitable defense that might be set up against the payee."

This holding was approved by this Court in *Catron, admr., v. Cross*, 3 Heis., 587, and is conclusive of this case.

Reverse the judgment.

R. A. JACOBS v. THE STATE.

A plea of former conviction by confession on the same indictment which shows upon its face that there never was any confession, conviction or judgment of record, is bad.

FROM COFFEE.

Appeal in error from the Circuit Court of Coffee County. J. J. WILLIAMS, J.

Jacobs v. State.

C. DICKENS CLARK for Jacobs

Attorney-General LEA for The State.

COOPER, J., delivered the opinion of the Court.

The record shows that Jacobs was indicted at the January term of the Circuit Court for carrying a pistol, and that the cause was continued to the next term as on his affidavit, he entering into recognizance with security for his appearance. At the next term he filed a plea of former conviction, which was demurred to, and the demurrer sustained. He then put in the plea of not guilty, upon which he was tried and convicted, and judgment rendered on the verdict. He appealed in error.

The error now relied on is based on the action of the Court below upon the plea. The plea is in substance that "at the January term the defendant came into Court, pleaded guilty, and submitted his case, whereupon he was put in jeopardy, convicted and punished, as appears by the proceedings had in the case at that term, of which the following is a true and perfect copy." Then follows the form of a judgment of submission upon a confession of guilt, fining the defendant ten dollars and costs, and giving judgment against him and a security, whose name is left blank, who is represented as appearing and acknowledging himself security for the fine and costs. Then follows the form of an order by the Court remitting all of

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the fine except fifty cents and the State and county tax, and an appeal by the Attorney-General to this Court from so much of the judgment as remitted the State and county tax, which is granted by the Court. The plea then adds: "The foregoing was the judgment of the Court upon defendant's plea of guilty as drawn by the Attorney-General, and after the Attorney-General had gone, on a subsequent day of the term, the Court directed the Clerk not to enter the foregoing judgment, and rescinded the same, and ordered the case to stand upon the docket for hearing, and continued it to the next term, as appears by the record, and this was done without the consent and against the will of the defendant."

The causes of demurrer to this plea are that it shows on its face that the entry drawn by the Attorney-General, relied on as a plea of former conviction, was never entered of record as the judgment of the Court, and that the plea fails to show any judgment of record on the submission.

A plea of former conviction in a Court of record can, it is clear, only be sustained by a conviction of record: 3 Greenl. Ev., § 36; *Slaughter v. State*, 6 Hum., 410. And the plea shows upon its face that there never was any confession, conviction or judgment of record. The demurrer was well taken. Whether a plea of former jeopardy might be good, without a judgment of record or entry of record, we need not stop to inquire. For the plea filed was not that character of plea,

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and this is the same case in which the alleged proceedings were had. The Circuit Judge seems to have considered the submission of guilty as conditioned upon his agreeing to the entry as drawn up, and in this view he is sustained by the subsequent action of the defendant. He does not insist upon his submission as he would have done if it had been unconditional. He chose to put in a plea of not guilty, which was a voluntary abandonment of his plea of guilty and a waiver of any action of the Court thereon.

The defendant has been only once in jeopardy. Affirm the judgment.

WYATT LAYNE v. THE STATE.

CRIMINAL LAW. *Disturbing public worship.* Section 4853 of the Code is intended to protect assemblies met for religious worship. A meeting held for the enjoyment of a Christmas festival, though it was especially intended for Sunday-school scholars and their teachers and friends, does not change its character nor make it an assembly for religious worship.

FROM COFFEE.

Appeal in error from the Circuit Court of Coffee County. J. J. WILLIAMS, J.

Layne v. State.

C. DICKENS CLARK for Layne.

Attorney-General LEA for The State.

DEADERICK, C. J., delivered the opinion of the Court.

Layne was presented at the January term, 1879, of the Circuit Court of Coffee county for disturbing "an assembly of persons met for religious worship," and was convicted of said offense at the next May term. He was fined twenty dollars, and has appealed to this Court, the Circuit Judge having refused to grant him a new trial.

This presentment is framed under section 4853 of the Code, and is in the language of that statute.

It appears that the meeting was held at a schoolhouse, and is described by the witnesses as a "Sunday-school celebration and Christmas tree," at which no religious services had been appointed, but speeches were made upon the subject of Sunday-schools and public morality. On a Christmas tree were hung presents, and singing and music upon violins were the entertainments of the occasion.

Two persons were distributing the presents from the tree, calling the names of those for whom they were intended, when plaintiff in error, under the influence of liquor, placed himself on his back on the floor, and kicked the Christmas tree, swearing in a loud voice, to the great annoyance and disgust of the decent people present. He was finally induced to leave.

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His conduct was very reprehensible, and he might have been indicted, and should have been exemplarily punished for his indecent profanity in the presence of the women and children and other good people there assembled, and we regret that we cannot affirm the judgment against him. But the Act under which he is presented is intended to protect "assemblies met for religious worship." The meeting disturbed was for the enjoyment of a Christmas festival, and the fact that it was especially intended for Sunday-school scholars and their teachers and friends, does not change its character, nor make it an "assembly for religious worship."

We hold, therefore, that the evidence does not support the charge made in the presentment, and that the judgment must be reversed.

Battle v. House.

WILLIAM BATTLE et al. v. LUCY M. HOUSE et al.

WILL. *Construction.* Real estate is devised by will to several children of the testator, but conditioned that no division be made until the youngest became of age, and if at that time any of his children have died, leaving children, that they be entitled to such share as their parent would have been entitled to if alive. Before a division of the property could take place under the provisions of the will, a daughter of the testator died, leaving surviving her a child. *Held:* That the interest of the deceased daughter vested in her surviving child, and was not subject to any creditor of the deceased daughter.

FROM GILES.

Appeal from the Chancery Court at Pulaski.
W. S. FLEMING, Ch.

W. H. McCALLUM and J. S. WILKES for Complainants.

T. M. JONES & SON and T. W. TURLEY for Defendants.

DEADERICK, C. J., delivered the opinion of the Court.

The bill in this case was filed by the creditors of Mrs. Dickson, formerly Mrs. Clack, to subject to the satisfaction of their claims lands devised to her by her father, Spencer Clack. Mrs. Dickson

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died, leaving no personalty, and if the land devised cannot be reached, complainants are without remedy. Spencer Clack made his will in February, 1854, and died in September next thereafter. The will was duly proved, and after making some provisions for the support and education of his younger children, and some specific bequests, he directs in the third clause that all the balance of his property should be kept together by his executors, and managed in the same way after his death as before, until his youngest child shall arrive at the age of twenty-one years. And his executors are clothed with full power to sell any of his property, real or personal, or purchase or exchange.

The fifth clause is as follows: "It is my will and desire, when my youngest child shall arrive at the age of twenty-one years, that my property, both real and personal, shall be equally distributed between my children and the descendants of my children. If any of my children shall be dead and leave any children surviving them, the children of such dead children taking the interest of his or her parents would have taken, if he or she had lived." Upon the construction of the foregoing depends the rights of the parties, the remainder of said clause giving the shares of daughters to their sole and separate use.

Mrs. Dickson died after her father, and a year or two before the youngest child of testator arrived at the age of twenty-one years, leaving a daughter, defendant, Lucy M. House, surviving her.

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After the youngest child attained the age of twenty-one years, the land of testator was partitioned, and a tract of about 121 acres allotted to defendant, Lucy M. House, and to reach this land for satisfaction of debts due from Mrs. Dickson, this bill is filed.

The third and fifth clauses of this will were construed in the case of *Perkins v. Clack*, 3 Head, 734. The opinion seems to consider the interests of the children as vested, and proceedings to subject the interest of one of the sons to his debts before the youngest child came of age were sustained, said proceedings directing a sale of such interest, but refusing to allow any division of the land until the youngest child arrived at the age of twenty-one years. This decision, it is insisted by complainants is conclusive of the question at issue.

While it is true the Court held that the right of the children of testator, under the will, was vested and subject to sale, yet it is neither discussed nor decided that the death of the devisee, leaving a child, before the time appointed for division, would or would not have defeated such interest.

The language and intention of the will is plain and unambiguous. His executors are to keep all his property together until his youngest child shall become of age. They are to have the same power in all respects to manage the estate for the benefit of his children as he would have if living. And

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when the estate is to be distributed, the children of any deceased child of testator is to take the share their parent would have taken if living.

Mrs. Dickson's daughter, Lucy M., falls within this provision of the will, and is entitled to take the interest her mother would have been entitled to if she had lived until the youngest child attained the age of twenty-one years. So if the language of the will can be construed as vesting Mrs. Dickson with the fee simple interest, it very clearly provides that if she dies before the youngest child comes of age, leaving a child, that child shall take the interest.

The case of *Brown v. Dortch* is similar in its facts and principles to this case. Testator there directed his property to be equally divided between his wife and children, but directed his estate to be kept together and farming operations continued, and to give his or her portion to each child as he or she should marry, or arrive at age, and providing if any should die before marrying or coming of age, his or her share should go to the survivors.

Judge Nicholson, in announcing the opinion of the Court in construing the testator's will as to the rights of one of the devisees, says: "He took a fee simple estate in the real property and an absolute one in the personal property, subject to be defeated in the happening of the contingency. The contingency has happened; he has died under

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age and unmarried, and his estate terminated, by the terms of the will, by this event." 12 Heis., 740, 750.

The Chancellor gave the complainant the relief prayed for, and in this we think he was in error.

The decree will be reversed, and the bill dismissed with costs.

4L 206
8L 362
14L 438
4pi 184

4L 206
117 467

 ROBERT TURNER v. THE STATE.

1. **CRIMINAL LAW.** *Circumstantial evidence. Charge of the Court.*
Familiar rules. Where an offense is sought to be established by circumstantial evidence, it is error if the lower Court refuses to charge "that the circumstances should be such as to exclude every other hypothesis than that of the defendant's guilt." It is always safer to lay down familiar rules of this character in language universally adopted and approved than to undertake to give a new version in more doubtful language.
2. **SAME.** *Argument.* It is the duty of the lower Court to see that no improper statements are made in argument, likely to influence the jury. It is not intended to limit or restrict legitimate argument, but a statement of facts entirely outside of the evidence, and highly prejudicial to the accused, cannot be justified as argument.

 FROM SUMNER.

Appeal in error from the Circuit Court of Sumner County. J. C. STARK, J.

Turner v. State.

C. R. HEAD for Turner

JOHN FRIZZELL for The State.

McFARLAND, J., delivered the opinion of the Court.

This was a conviction of the crime of grand larceny. There was no direct or positive testimony of the defendant's guilt. He was convicted upon circumstantial evidence. We deem it unnecessary to enter into an examination of it. It is sufficient to say that the case was a debatable one, and the evidence required close scrutiny by the jury, and they should have been properly instructed in reference to such evidence.

The Judge's charge on this point is as follows: "If the evidence is circumstantial, and is so strong and so well linked together as to generate in the mind a full belief of the guilt of the defendant, then it would be your duty to convict. But the facts and circumstances should be sufficiently strong, and so connected together, and so point to the defendant's guilt, as to make it not merely probable that the defendant is guilty, for you cannot find upon mere probabilities; but they must convince the mind fairly and fully of the guilt of the defendant, or you should acquit."

The defendant's counsel requested the Judge to charge that, before the jury could convict upon circumstantial evidence alone, the circumstances

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should be such as to exclude every other reasonable hypothesis than that of the defendant's guilt. This was refused.

The charge requested is the universal rule in such cases, never denied, so far as we know. The charge given is not its equivalent, either in language or substance. We do not place our objection alone upon the failure of the Judge to tell the jury that they should be convinced of the defendant's guilt beyond a reasonable doubt, or in substituting for the words "reasonable doubt" the words "fully and fairly convinced." Still, the phrase "reasonable doubt" is a settled phrase of the criminal law, and need not be departed from, and there need be no repugnance to its use. But the fatal objection to the charge is the failure of the Judge when specially requested to give to the jury the settled rule to guide them in coming to a conclusion upon circumstantial evidence. It is always safer to lay down familiar rules of this character in language universally adopted and approved, than to undertake to give a new version in more doubtful language. The refusal of the charge requested was error.

Many other questions have been made, only one of which we deem it necessary to notice.

We find in the bill of exceptions the affidavits of three members of the bar, who were defendant's counsel, which, in substance, shows that upon the trial below the Attorney-General in his argument to the jury told them that there was a regular

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band of thieves in the neighborhood where this crime was committed. That the defendant, Turner, was one of them, naming a number of others, these names being persons known by the jury to have been recently convicted of crimes. That unless the jury would convict the defendant in this case, he would not blame the people for taking the law in their own hands.

There was no evidence before the jury to authorize this statement. One of defendant's counsel remonstrated, but the Attorney-General proceeded in the same strain without interruption from the Court. This being a matter occurring in open Court, the proper mode to put it in the record would have been to request the Judge to insert it over his own signature in the bill of exceptions. The Judge, however, makes this affidavit part of the bill of exceptions without questioning in any manner the correctness of its statements.

We are by no means disposed to interfere unnecessarily with the sound discretion of a Circuit Judge in conducting a trial below in those matters which the law peculiarly entrusts to him. But it is the right of every defendant to have a fair and impartial trial, and the Circuit Judge should see that this is accorded to him. In the heat of debate counsel may often inadvertently travel outside of the evidence, and slight departures from the strict rules in this regard may be overlooked, though it is better always to confine the

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argument strictly to the evidence before the Court and jury. But, upon the most liberal view, the remarks of the Attorney-General, as reported in this bill of exceptions, cannot be justified. His statements, especially in concluding arguments, often have great weight with juries, and in this case he tells the jury that the defendant is one of a band of organized thieves. There was no evidence of this sort before the jury, and the inference is that he made the statement of his own knowledge. Further, he tells the jury that unless they convict the defendant he would not blame the people for taking the law in their own hands. We do not suppose the Attorney-General fully considered the force of this language. It was doubtless said in the heat of debate. Nevertheless, it implies a threat of mob violence unless the jury yield to the demand for a conviction. This, from the law officer of the State, whose duty it is to enforce the law, was improper. The Circuit Judge should not have permitted remarks of this character. It is his duty, whether objections be made by defendant's counsel or not, to see that no improper statements are made likely to influence the jury in their verdict, and that the cause is tried upon the sworn testimony of witnesses examined in open Court in the presence of the accused, and that his right to cross examine the witnesses should not be abridged. We do not mean to limit or restrict legitimate argument, but a statement of facts entirely outside of the evidence, and highly prejudicial to the ac-

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cused, cannot be justified as argument. We have no disposition to exercise our revisory power in a censorious spirit, and we do not say that we would reverse for every departure from strict propriety in matters of this character, but we could not hesitate to do so when we can see that improper influences have been permitted to go before the jury likely to deprive the defendant of a fair and impartial trial. The question being brought directly to our attention, we cannot pass it in silence.

Too great care cannot be taken in excluding from the jury all improper influence. If we would make the preservation of jury trials a matter of boast, it ought, as far as possible, to be preserved in its purity. The guilty ought to be punished, but their conviction ought to be obtained upon the law and the evidence. We certainly mean no reflection upon the conduct of the Attorney-General and Circuit Judge, yet we think it was a violation of the defendant's legal rights.

Judgment reversed.

Gray v. Baird.

4L 319
10L 565
13L 470

GRAY AND WIFE v. BAIRD AND MARCHBANKS.

HOMESTEAD. *Purchase Money. Failure of officer to lay off homestead.* Gray borrowed from Hall an amount of money to pay for a tract of land which he bought under a decree of the County Court, giving him therefor his notes, retaining on the face of them a lien on the land. Being also indebted to one Kennedy, the latter obtained a judgment against Gray before a Justice of the Peace, and ultimately the land was sold under said judgment. In the meantime, Hall sued Gray upon his notes, and obtained judgment, which was stayed by Marchbanks. At the expiration of the stay, the land of Marchbanks, the stayor, was sold to satisfy the judgment against Gray, and subsequently Marchbanks, having taken a judgment over against Gray, his principal, redeemed from Kennedy, adding thereto the amount of his own judgment. Gray had no other land besides the tract on which he lived, and which had thus been sold. *Held:* 1. The giving of the notes for money borrowed to pay for a tract of land, although the notes recited a lien upon the land, does not make the money purchase money for the land. It is a species of security, but not such as to create a vendor's lien. 2. Gray and wife having a homestead right in the land originally sold to satisfy Kennedy's judgment, and redeemed by Marchbanks, as creditor by reason of having paid the judgment which he had stayed, the purchaser, as well as the creditor who redeems, takes the land subject to the homestead right of the debtor. The mere fact that the officer, in selling the land, failed to assign the homestead, does not deprive the debtor of the right, nor vest a greater right than the officer could sell in the purchaser.

FROM MARSHALL.

Appeal from the Chancery Court at Lewisburg,
W. S. FLEMING, Ch.

Gray v. Baird.

LEWIS BROS. and J. S. WILKES for Complainants.

R. WARNER for Defendants.

FREEMAN, J., delivered the opinion of the Court.

Gray, in 1873, was owner of a tract of land of 100 acres. Kennedy got a judgment against Gray, before a Justice of the Peace of Marshall county, for \$388.38, on which an execution was issued June, 1874, and levied on this tract of land, returned to October term of the Circuit Court, and the land condemned for sale, which was done, Kennedy becoming the purchaser, bidding his debt and costs. In the meantime, two judgments in favor of Hall had been rendered against Gray, in 1874, for \$420.00 each, with ten per cent. interest. Marchbanks stayed these judgments for Gray, and when executions issued they were levied on Marchbanks' lands—his home—and it was sold and the debt thus paid, amounting to near \$1,000. He thereupon took judgment over by motion against Gray, and redeemed the land from Kennedy, advancing the amount of his judgments on the land, besides paying Kennedy's debt. Marchbanks being in possession, this bill is filed by Gray and wife to assert the right to homestead under our law.

The bill goes on the ground that possession was not voluntarily given of the land to Marchbanks, but was obtained by fraud and coercion. This is denied in the answer.

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The fact is, that when the time of redemption was about out, Marchbanks, having been compelled to give up his own, wished possession of this land, unless it was redeemed. Gray seems to have tried to borrow the money to redeem the land, but failed to get it. He probably promised Marchbanks if he could not redeem he would yield possession to him when the time expired. When he failed to redeem, Marchbanks urged his claim to possession. Gray then insisted on his right to hold his homestead, whereupon Marchbanks commenced his action of ejectment, upon which Gray sent for him and told him he should have possession, and soon after Marchbanks was allowed to move in, and Gray moved off, probably renting another place. He is not alleged or shown to have obtained any other homestead, and we are satisfied has not done so.

On this aspect of the case, the question is: What are the rights of the parties? The homestead right did not pass to Kennedy under his purchase, for by the Constitution, Art. V., sec. 11, as well as the Code, sec. 2114a, Act of 1870, the homestead in possession of the head of a family, to the value of \$1,000, is exempt from sale under legal process during the life of such head of the family, and goes to the widow and children during their minority occupying the same. "Nor shall said property," says the Constitution, "be alienated without the joint consent of the wife when that relation exists"

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It is true sec. 2116 provides that the officer who levies an execution or attachment shall lay off the homestead, and gives the mode of doing so, but this duty being imposed upon the officer, if he fails (as appears to have been in this case) to perform that duty, it certainly could not be held that the sale passed the right which the Constitution provided should be exempt from such sale. It would simply pass the title, subject to this right, but could not defeat it. This being so, what was the position of Marchbanks when he redeemed the land from Kennedy? He did so by virtue of secs. 2128-9 of our Code, authorizing a *bona fide* creditor—that is a judgment creditor—to redeem from a purchaser by paying his bid and making the advance therein required. In this case he has advanced the full amount of his judgment, and holds the land under sec. 2129, as if he had been the original purchaser. If he is held to take the shoes of the original purchaser, at the advanced price, it seems clear that he only takes what that purchaser bought, and holds that and nothing more by virtue of his redemption, charged, however, with the amount of his own debt, whether he has advanced part or the whole of such debt. To hold otherwise would be to enable him, by redeeming, to get more than the officer had sold or the purchaser had bought. If this be correct, it would seem to follow that Marchbanks, by his redemption, obtained no right to the homestead, and could claim none, whatever might be the

Gray v. Baird.

rights of a party enforcing a vendor's lien, or a claim for the purchase money in any form, it might be sought to be enforced. Be this as it may however, the Court is of the opinion that the debt stayed by Marchbanks was not the purchase money for the land. The land had been bought by Gray under a decree of the County Court. He had paid for it. Hall had advanced or loaned him the money to pay for the land, and had taken his notes, retaining a lien on the face of them on his land. These notes were the basis of the judgment stayed by Marchbanks. This could in no sense be held to be the purchase money of the land. That had been paid by Gray. This was a debt for borrowed money, advanced or loaned, it is true, to pay for the land, but still but a debt for loaned money. The lien on the face of the note did not make it such. That was a form of security carried out by the parties themselves, but is not a vendor's lien, but one by contract.

The using borrowed money to pay for land does not give the lender the right even to be subrogated to the vendor's lien, much less does the note given for such money give such lien, as held by this Court, in *Durant v. Davis*, 10 Heis., 522. It was also held by this Court that when a vendor conveyed the land, and then took a deed of trust to secure the purchase money notes, and the vendee died before the enforcement of the trust, the widow was entitled to dower, giving, among

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other reasons, that the vendor had chosen the form of his security, and the one chosen made the land subject to the wife's dower.

This being so, Marchbanks cannot claim to be subrogated to a vendor's lien by having paid the judgments stayed by him. The notes themselves were not entitled to such lien, and as a matter of course paying them cannot give such a right.

The result is, the decree of the Chancellor is affirmed, with costs.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
WESTERN DIVISION.

4L 318
 13L 304
 13L 310

JACKSON, APRIL TERM, 1880.

R. W. LIGHTBURNE et al. v. TAXING DISTRICT.

CONSTITUTIONAL LAW. *Privilege tax. Steamboat and railroad agents.*

The Act of the Legislature of 1879, chap. 84, providing means for the local government of the "Taxing District," which provides in sec. 7, sub-sec. 36, that "Steamboat agents and the agents of railroad companies, other than the proper officers of railroads terminating at the Taxing District, shall pay a privilege tax of \$25 per annum," is not a regulation of commerce between the States, and is not therefore in violation of the Constitution of the United States.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. J. O. PIERCE, J

H. C. KING for Lightburne et al.

Lightburne v. Taxing District.

C. W. HEISKELL for Taxing District.

FREEMAN, J., delivered the opinion of the Court.

These cases are brought to this Court on proceedings instituted in the Police Municipal Court of what is known as the "Taxing District of Shelby County," the municipal body taking the place of the city of Memphis in the control and government of said city. The first is to recover a penalty for doing business without a license as steamboat and railroad agent, in violation of the law of the District. The other is for doing such business without license as a railroad agent alone.

The Court below held the parties liable in both cases, from which appeals are brought to this Court.

The cases, as we understand it, are intended as test cases, in order to settle the question whether the law imposing the taxes sought to be collected is valid or not under the Constitution of the United States.

The Act of the Legislature authorizing this privilege tax is that portion of the amendment to the law establishing the "Taxing District" prescribing the sources of revenue and mode of collection. The Act of 1879, chap. 84, sec. 7, subsec. 36, Heiskell's Digest. It is as follows: Steamboat agents and the agents of railroad companies, other than the proper officers of the railroads terminating in the Taxing District, shall pay a privi-

Lightburne v. Taxing District.

lege tax of twenty-five dollars per annum, and fees, and a separate privilege tax shall be paid for each road represented.

In the case of Lightburne, agent, the defendant is the employee of the Memphis and Cincinnati Steamboat Packet Company, the Company and the owners of the steamers being residents of that State. The steamers of the Company were engaged in carrying freight and passengers from the port of Memphis, in Tennessee, to the port of Cincinnati, Ohio, and beyond the State of Tennessee. The defendant, as employee of the company, doing business in the city of Memphis, at a salary, his business being exclusively to make contracts for freight and passengers between the two ports mentioned.

The sole question submitted to the Court below was whether the Act in question was a regulation of commerce between the States, and therefore in violation of the Constitution of the United States.

In the other case, the defendant admits he acted as railroad agent, being solely the agent of the Pennsylvania Central Railroad, a corporation of the State of Pennsylvania, said road having no terminus in Tennessee. The agent's business was to make contracts to transport freight and passengers from the port of Memphis, Tennessee, to points in the State of Pennsylvania and beyond the State of Tennessee.

The sole question submitted to the Court below was whether the Act of the Legislature of Tennessee is a regulation of commerce, discriminating

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between railroads having termini in Tennessee and those not having such termini, and as such in violation of the Constitution of the United States.

As these cases were intended to be test cases, and it is desirable that the Supreme Court of the United States should authoritatively pass upon the questions presented, we do not go into an elaborate investigation of the subject involved. We content ourselves with referring to and following the case of *Osbourne v. Mobile*, 16 Wall. R., 479. In that case an ordinance of the city of Mobile required that every express company or railroad company doing business in that city, and having a business beyond the State, should pay an annual license of \$500, which should be deemed a first grade license. All such companies doing business within the State should pay for license \$100, being a second grade license; and those doing business within the city, only \$50, a third grade license. It was held that this ordinance was not void as to a Georgia express company having a business office in the city, and was not repugnant to the provision of the Federal Constitution vesting in Congress the power to regulate commerce among the several States.

No distinction is perceived in the principle between the above case and the cases now under discussion. The Circuit Judge held in accord with this view.

We affirm his judgment, and hold the statute valid.

State v. Kennedy.

THE STATE v. B. KENNEDY.

ATTORNEY-GENERAL. *Fees. Unlawful carrying arms* Upon conviction for unlawfully carrying a pistol, the Attorney-General is not entitled to a fee of twenty dollars, but only to the fee allowed by law for convictions in misdemeanors.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby County. L. B. HARRIGAN, J.

T. W. BROWN for Attorney-General.

FREEMAN, J., delivered the opinion of the Court.

The defendant was indicted under the Act of 1871, for carrying a pistol other than an army or navy, or such as used in civilized warfare, and that not openly and in his hand, as required by the above statute. The defendant submitted his case, and was fined fifty dollars, and also adjudged that he should be confined in the county work-house at hard labor for sixty days.

There being no objection to this judgment, it must be affirmed.

But in addition to the above, the Attorney-General moved the Court for instructions to the Clerk to tax a fee of twenty dollars for obtaining

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the conviction; which was adjudged in his favor, provided the defendant secured the fine and costs, but if the county had it to pay, it was held that only the fee in misdemeanor cases, under like circumstances, was to be taxed.

We suppose the case is here to test the correctness of the fee of twenty dollars as ordered.

The Criminal Judge ordered the twenty dollars to be taxed, as the fee of the Attorney-General, under section 4751 of the Code, which provides: "The Attorney-General is entitled to a tax fee of twenty dollars in each case where a defendant is convicted of any of the offenses enumerated in this article"

The offenses enumerated before this section in this article are "carrying Bowie knives, Arkansas toothpicks, and drawing such weapons or cutting with them."

On referring to the original Act, in Nicholson's Revisal, it is seen that the section of the Code above cited is taken from the 5th section of the Act of 1837, and this tax fee was allowed only in the cases enumerated, intended to put down the use of the Bowie knife and like weapons. On the settled principle of construction, that in the compilation of the Code the former law was intended to be embodied, unless a purpose to change is clearly shown, it might well be held that the Code meant no more than to embody the old statute, and apply to the cases provided for by it. Be this as it may, the offense for which the party

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is indicted is not included in the article, but is created by a statute subsequent to the Code. So that it is not within the letter of the section, as it does not appear to be within its spirit or purpose.

However commendable it may be in our Judges strictly to enforce the law against the practice of carrying pistols, and however much we feel inclined to sustain them in such efforts, we do not think proper to go beyond a reasonable limit in inflicting punishment, by construing a statute beyond its fair meaning, to reach the case, and thus increase the penalties beyond what is imposed by the Legislature. We therefore hold the Attorney-General is not entitled to the tax fee of twenty dollars in such cases, but only to the fee allowed by law for convictions in misdemeanors.

State v. Anderson.

THE STATE v. JAMES A. ANDERSON.

CRIMINAL LAW. *Indictment of executors, guardians, etc. Act of March 9, 1875.* An indictment of an executor, administrator, guardian or trustee, under the Act of March 9, 1875, for converting money to his own use and failing to pay over trust funds, must contain averments that a settlement, voluntary or compulsory, has been made, that the money has not been paid over, that judgment has been obtained, and *fi. fa.* thereon returned *nulla bona*.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby County. L. B. HERRIGAN, J.

Attorney-General LEA for The State.

T. W. BROWN and L. E. WRIGHT for Anderson.

TURNER, J., delivered the opinion of the Court.

On the 9th of March, 1875, the Legislature passed an Act entitled "An Act to punish executors, administrators, guardians or trustees for converting to their own use and benefit and failing to pay over trust funds."

Section 1 provides that "Any executor, administrator, guardian or trustee, holding trust funds, who shall wilfully and maliciously convert to his own use

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and benefit any moneys, notes, stocks, bonds, or other evidences of value, of whatever nature and description, the assets of the estate for which he is executor, administrator, guardian or trustee, and on final settlement shall fail to pay to those entitled to the funds thus entrusted to and due from such executor, administrator, guardian or trustee, when the same are not paid and cannot be collected by due process of law, shall be adjudged guilty of felony before any competent Court, and on conviction shall be punished by imprisonment in the penitentiary not less than one year and not more than ten years."

In August, 1878, the defendant was qualified as administrator of the estate of Maggie Williams. At the January term, 1880, of the Criminal Court of Shelby county he was indicted, the indictment charging that he had received into his possession, as such administrator, a large sum of money, of the value of \$1,300, which he had wilfully, maliciously, feloniously and fraudulently converted to his own use and benefit. That his term of office as public administrator had expired, his successor had been appointed, and his letters as administrator of the estate of Maggie Williams revoked. That the Probate Court had ordered and commanded him to pay over to those entitled to receive the same all the money which had been received by him, or assets belonging to said estate, and by him held in trust, etc., which he failed to do. That he failed and refused to make a settlement of his accounts as administrator.

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The Judge of the Criminal Court quashed the indictment of his own motion.

To sustain an indictment for the offense created and defined by the Act, it is necessary to aver and prove that there had been, before the finding of the indictment, a final settlement by the party accused, made either voluntarily by him, as provided by statutes, or by compulsion through the instrumentality of a court of competent jurisdiction. It must also be averred, and proved that the amount due has not been paid over. It must also be averred and proved that the amount due cannot be collected by due process of law, which latter averment necessitates the further one of the existence of a judgment or decree from which such process has been issued and returned *nulla bona*.

Such averments are not made here, and, as appears on the face of the indictment, cannot be made.

Affirmed

State v. Ellison

THE STATE v. MILES ELLISON.

CRIMINAL LAW. *Former acquittal.* An acquittal of the charge of stealing a hog is not a bar to a subsequent indictment for wantonly and willfully killing the hog.

FROM SHELBY.

Appeal in error from the Circuit Court at Bartlett, Shelby County. T. D. ELDRIDGE, J.

Attorney General LEA for The State.

W. G. REEVES for Ellison.

FREEMAN J., delivered the opinion of the Court.

Defendant was indicted for wantonly and willfully killing a hog. He had been previously indicted for the larceny of the same hog, but had been acquitted. He pleads this fact as once in jeopardy, in bar of the present indictment, and his plea was held good by the Judge below.

In this there was error. The offense of maliciously or wantonly killing the stock of another in no wise involves the idea of stealing a hog, nor does the stealing a hog involve, as a necessary part of the offense, the act of wantonly killing it. A man may well steal a hog alive and not kill it at all.

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The principle of the case of *Fiddler v. State*, 7 Hum., 508, that whatever is a necessary ingredient in the offense for which the party was tried, but must be considered as having been passed on in the former trial, is a correct one, but has no application to the facts of this case.

Reverse the judgment, and remand the case for further proceedings.

CRIMINAL LAW. *Indictment. Letting a house for purposes of prostitution.* An indictment which charges that the defendant let a dwelling house, well knowing that the lessees intended to use it for purposes of prostitution, and it was so used, is fatally defective.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby County. J. E. R. RAY, J.

State v. Wheatley.

Attorney-General LEA, for The State.

for Wheatley.

COOPER, J., delivered the opinion of the Court.

The defendant was indicted, for that he did unlawfully let to certain persons named a certain dwelling of his, "then and there well knowing that the said persons intended to use the said dwelling house as a place of resort for the purpose of prostitution and lewdness, and the said dwelling house was so used and occupied for the purposes aforesaid."

The indictment was, upon motion of the defendant, quashed, and the Attorney-General appealed.

The indictment is for letting a house, knowing that the lessee intended to use it for the purposes mentioned, the house being actually used for those purposes. In England, it seems to be settled that the landlord is not punishable when the keeping of the house for illicit purposes is the exclusive act of the lessee. In America, the weight of authority seems to treat the act of letting as an attempt to commit the offense, and the subsequent keeping as making the landlord liable jointly with the lessee for the nuisance: 1 Bis. Crim. Law, sec. 1090, *et seq.* The indictment in this case is probably fatally defective as not charging either offense, but merely a letting with knowledge of the lessee's purpose. If, however, the indictment be treated as charging an attempt, the question is

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squarely presented whether mere knowledge of the lessee's purpose, without more, is sufficient. If the charge had been that the premises were let to be used for the illegal purpose, there is a strong intimation that the indictment would be good: *Childress v. Nashville*, 3 Sneed, 347. And mere knowledge might be sufficient in those States in which such knowledge renders a transaction illegal: *Benj. on Sales*, sec. 506. But in this State we have adopted the distinction between knowledge of the proposed illegal use and actual intent to aid in the unlawful purpose: *Henderson v. Waggoner*, 2 Lea, 133; *Jones v. Planters Bank*, 9 Heis, 455. To vitiate a contract, the illegal act or purpose must form a part of the consideration: *Thruston v. Marshall*, 3 Lea, 740.

There is no error in the judgment of the Court below, and it must be affirmed.

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J. B. HILLS et al. v. D. F. GOODYEAR.

1. EVIDENCE. *Preponderance*. As a general rule, a mere preponderance of evidence, however slight, must prevail in civil cases.
2. SAME. *Same*. *Libel*. *Slander*. An exception to this rule has been made in actions for libel or slander, where the defendant relies in justification on the truth of the defamatory charge.
3. SAME. *Same*. *Presumption of law*. In other civil cases involving issues charging or implying crime, the general rule of the preponderance of evidence prevails, but the presumption of law in favor of innocence, and evidence of good character, if produced, must be taken into consideration by the jury in ascertaining on which side the preponderance exists.
4. SAME. *Same*. It is not the preponderance of evidence in relation to particular facts in the cause, but the preponderance of the entire evidence on the issues joined, weighed in connection with the presumptions of law in favor of innocence, which should prevail in such a case.
5. SAME. *Same*. *Charge of Court*. The charge in this case, although not accurately defining the proper rule, held not to be so erroneous as to require reversal, under the circumstances disclosed by the record.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. C. W. HEISKELL, J.

HUMES & POSTON for Hills.

J. R. & W. S. FLIPPIN and R. D. JORDAN for Goodyear.

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COOPER, J., delivered the opinion of the Court.

In December, 1871, Hills bought the interest of Goodyear in their partnership business, agreeing to assume and pay the partnership debts, and giving Goodyear a bond, with sureties, to indemnify him against them.

This suit was brought by Goodyear on the bond against Hills and his sureties, to recover the amount of a note, alleged to be a partnership note, which he had been compelled to pay. Issues were joined on the pleas of covenants performed, set-off by account for money had and received, and that the note was not covered, nor intended to be covered by the bond of indemnity.

The plaintiff recovered judgment, and the defendant appealed in error.

The bill of exceptions says that the plaintiff offered evidence tending to show that after his sale he was compelled to pay, and did pay, a note of the firm, dated April 12, 1871, for \$250, which is set out in the record.

The defendant then offered evidence tending to show that the note was the individual note of the plaintiff, not of the firm; that the money received on it was handed to the book-keeper of the firm without explanation, placed to the credit of the plaintiff, and used in paying a note of the firm in bank; that the plaintiff drew out cash at various times, amounting to \$143, against his individual credit; that, although the note shown in evidence

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was signed in the firm name, it was not the note given; that the plaintiff's own note was originally given, and the note exhibited made by plaintiff, just before the bringing of the suit, for the purpose of being used in the suit, and never delivered to the payee; that plaintiff, in November, 1871, collected certain specified accounts due the firm, and never paid the money into the firm nor reported collections, and that, at the date of the sale, the books showed the claims uncollected.

The plaintiff, in rebuttal, offered evidence tending to prove that he did not draw out cash against the credit of \$250; that the note was originally the firm note, not his note; that he notified defendant that it was outstanding before the sale; that he promptly, on December 5th, 1871, entered on the books a part of his alleged collections, paid over the residue to the firm, and gave the book-keeper a memorandum thereof to be entered on the books.

The defendant then offered evidence that, although there was an entry on the books under the date of December 5th, 1871, in the plaintiff's handwriting, it was made after the purchase, and was fraudulently altered to the other date.

The plaintiff then offered evidence of his good reputation for honesty, integrity and veracity, which was admitted upon the defendant's attorney stating that his client intended to insist that the note in controversy was forged by the plaintiff; that the plaintiff fraudulently withheld moneys collected by him, and made false entries on the books.

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The bill of exceptions says that the charge of the Judge is not set out, as it was believed to be correct, except the following charge, excepted to at the time, which was the only charge on the particular point: "That inasmuch as the facts set up as a defense involved serious charges of moral dereliction against the plaintiff, they must be established clearly, and to the entire satisfaction of the jury."

The defendant requested the Judge to charge as follows, which he refused to do: "A preponderance of the evidence, however slight, is sufficient for the jury to find any fact involved in this cause, although the finding of such fact may establish the grossest misconduct, or even criminal misconduct, upon the part of the plaintiff."

The only errors relied on for reversal are assigned upon the charge made and the charge refused.

The distinction between civil and criminal cases in respect to the degree or quantity of evidence required to justify the finding of the jury is well settled. In criminal trials, the minds of the jury, in favor of life and liberty, must be convinced beyond a reasonable doubt: 2 Greenl. Ev., sec. 29. In civil cases, the duty of the jury is to weigh the evidence carefully, and to find for the party in whose favor it preponderates, although their minds be not satisfied beyond a reasonable doubt. As a general rule, a mere preponderance of evidence, however slight, must necessarily turn the scale:

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Chapman v. McAdams, 1 Lea, 500; *Knowles v. Scribner*, 57 Me., 497; *Gordon v. Parmelee*, 15 Gray, 413; 2 Whart. Ev., sec. 1246, note. 1.

At an early day, one exception to this rule was recognized, which is yet sustained by the weight of authority. If, in an action for libel or slander, the defendant rely in justification upon the truth of the defamatory charge, he is held to prove it beyond a reasonable doubt: *Chalmers v. Shackell*, 6 C. & P., 478; *Woodbeck v. Keller*, 6 Cow., 118; 2 Greenl. Ev., sec. 426.

Following the exception, it has been held in this State that a plea justifying a charge of perjury must be sustained by two witnesses, or one witness with strong corroborating circumstances: *Coulter v. Stuart*, 2 Yer., 225. It has also been held that a plea of justification not sustained is adding aggravation to injury: *Wilson v. Nations*, 5 Yer., 211. The logical result would be that proof tending to prove the truth of the charge, but falling short of establishing it, ought to be inadmissible. Yet, after a struggle, both in England and in the majority of the States of the Union, it has been settled that facts and circumstances tending to prove, but not proving the truth of a charge, may be received in mitigation, even where there is a plea of justification: *West v. Walker*, 2 Swan, 32; 2 Greenl. Ev., sec. 425. Some of the State Courts, "with less justice though better logic," have held otherwise: *Bush v. Prosser*, 11 N. Y., 347; *Knight v. Foster*, 39 N. H., 576. The reason for the ex-

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ception from the general rule has been well stated by Depue, J., in a recent opinion of the Court of Errors and Appeals of New Jersey: "In putting his justification on the ground of the plaintiff's guilt of the accusation, the defendant undertakes to prove the plaintiff's guilt, which comprises not only the doing of the act, but also the intent which the law denounces as criminal:" *Kane v. Hibernia Ins. Co.*, 17 Am. Law Reg., 294. Four of the Judges of that Court reserved the point, which was not then actually before the Court, whether there ought to be any exception from the general rule in this class of cases. And the mere preponderance rule was applied to such a case in *Ellis v. Buzzell*, 60 Maine, 209.

The tendency of modern decisions is to do away with any exception to the rule. A striking instance is found in the analogous cases of suits upon fire policies, where the defense is that the property insured was wilfully burned by the plaintiff himself. There is an early English decision to the effect that the crime, in such a case, should be so fully proved as to warrant a finding of a verdict of guilty upon an indictment: *Thurtell v. Beaumont*, 1 Bing., 339. It appears, however, from the cases cited in the note to 2 Whart. Ev., sec. 1246, and a discriminating collation of the authorities in 17 Am. Law Reg., 302, that only two States, Illinois and Florida, have followed this decision, while it has been repudiated, and the rule of a mere preponderance of evidence applied to

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such cases, in the States of Vermont, Massachusetts, Kentucky, Missouri, Louisiana, and Wisconsin, and in the Courts of the United States in the sixth and seventh circuits. And in *Kane v. Hibernia Ins. Co.*, *ut supra*, the highest Court of New Jersey, by the unanimous vote of the eleven Judges sitting, adopted the latter view, the learned Judge who delivered the opinion, undertaking to show that the original decision, making this class of cases an exception to the general rule of the preponderance of evidence, has been ignored of late years in England. The exception is still laid down as law in 2 Greenl. Ev., sec. 408, although the only American authority cited is to the contrary (*Hoffman v. Western Ins. Co.*, 1 La. Ann., 216), and is approved in 1 Taylor on Ev., 97a. It is dissented from by Mr. Wharton, *ut supra*, and by Mr. May in an article in 10 Am. Law Rev., 642.

The general rule has been adhered to in other cases involving issues charging or implying crime. In an action on a promissory note, it has been held that the defense that the note was obtained by false and fraudulent representations might be sustained by a preponderance of evidence, as in other civil cases, although the defense was based on a charge of fraudulent representations such as might be the subject of a criminal prosecution: *Gordon v. Parmelee*, 15 Gray, 413. So, where the action was in trespass for burning the plaintiff's building, and the evidence showed that the defendant, if guilty of trespass, had set fire to the

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building designedly, and was guilty of the crime of arson, the Court held that the issue might be determined by the fair preponderance of evidence: *Bradish v. Bliss*, 35 Vt., 326. So, where the action was on a statute which gave the right to recover the treble value of property feloniously taken: *Munson v. Atwood*, 30 Conn., 102. So, in trover, where the evidence was such as to involve a charge of larceny: *Bissel v. Wert*, 35 Ind., 54. So, in a bastardy case: *Knowles v. Scribner*, 57 Me., 497.

It does not follow, however, that a party who is charged in a civil case with crime or moral dereliction, may not have the benefit of good character and the presumptions of law in favor of innocence. Evidence of good character is admitted in criminal prosecutions because the intent with which the act, charged as a crime was done, is of the essence of the issue, and the prevailing character of the defendant's mind, as evidenced by his previous habits of life, is a material element in discovering that intent. Upon the same principle, the like evidence ought to be admitted in all other cases, whatever be the form of proceeding, when the intent, to be found as a fact, is involved in the issue: 1 Greenl. Ev., sec. 54, note; *Ruan v. Perry*, 3 Caines, 120; *Fowler v. Aetna Ins. Co.*, 6 Cow., 675; *Townsend v. Graves* 3 Paige, 455; Our decisions are in accord: *Scott v. Fletcher*, 1 Tenn., 488; *Henry v. Brown*, 2 Heis., 213, *Spears v. International Ins. Co.*, 1 Bax., 370.

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The admission of evidence of character is not assigned as error in the case now before us.

The law in all cases, civil or criminal, presumes innocence. Obviously, therefore, to create a preponderance of evidence in a civil case, where crime is imputed to one party, the other party assumes the burden of not only overcoming the evidence of his opponent, by a preponderance, but of overcoming also the presumption of law in favor of the innocence of his adversary. In other words, there is no preponderance on the side of the charge of guilt, unless the evidence is sufficient to overbalance the opposing presumption as well as the opposing evidence, including evidence of character: *Knowles v. Scribner*, 57 Me., 497; *Ellis v. Buzzell*, 60 Me., 209, *Bradish v. Bliss*, 35 Vt., 326. The difficulty has been in so wording a charge as to give the party implicated the benefit of the law without breaking down the distinction between civil and criminal cases, there being clearly no intermediate rule between the general rule in the one class and the general rule in the other: *Bradish v. Bliss*, 35 Vt., 326. The difficulty will be found illustrated in the cases just cited, and in *Rothschild v. Ins. Co.*, 62 Mo., 356, and *Thayer v. Boyle*, 30 Me., 475. The result has been to construe charges liberally, leaving a margin for the exercise of judicial discretion in the particular case. Strictly speaking, the application of the general rule by which the jury is guided in finding a verdict is

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not affected by the fact that evidence of character has been properly introduced, or a case made for the operation of the rule of legal presumption in favor of innocence. A mere preponderance, however slight, will still suffice to turn the scale, but to sustain a finding of crime, it must be a preponderance sufficient to outweigh the opposing evidence, including evidence of good character, if any, and the presumption in favor of innocence. The Court should instruct the jury upon the legal effect of the evidence of character or presumption of innocence, and it is the duty of the jury to weigh these elements, in connection with the other proof, in arriving at a conclusion on which side the preponderance exists.

If, therefore, upon the idea that the Judge, in the case before us, was bringing the criminal rule of evidence into a civil case, the defendant had presented a request embodying a correct exposition of the true rule, he would have been clearly entitled to it. He had, by the course he chose to pursue, made crime, involving a felonious intent, an element of defense, although not necessarily embraced in his pleading, nor, perhaps, essential to his defense. The plaintiff became, thereby, entitled to the benefit of his character, if good, and to the presumption in favor of innocence.

The defendant was not, therefore, entitled to the charge as embodied in his request. It would have been, in the form in which it was presented, under the facts of the case, altogether misleading. It

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was not the mere preponderance of the testimony on any fact involved in the cause which must decide, but the preponderance of the entire evidence on the issue joined, including that relating to character, and taking into consideration the presumption of innocence. The "preponderance of testimony," moreover, means "the weight, credit and value of the aggregate evidence on either side," upon the issues joined, not upon particular facts: *Coles v. Wrecker*, 2 Tenn. Leg. Rep., 14.

The only doubt is as to the correctness of the charge given. If his Honor had called the attention of the jury to the testimony touching character, and the presumption in favor of innocence, and had then said to them that the charges must be "established clearly and to the entire satisfaction of the jury," the language would, perhaps, be subject to the criticism that it approximated too nearly to the rule as usually announced in criminal cases. But the bill of exceptions tells us that the charge made was all that was said on the subject. In that view, the question is whether the language was intended to lay down a wrong rule, or merely states, in a general way, what was equivalent, under the circumstances, to the general rule.

It is conceded not to be error for a Judge to call the attention of the jury to the gravity of the charge made in such a defense as was relied on in this case, and to put the presumption of innocence in the scales as an element to weigh in favor of the plaintiff, "if the evidence was not

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entirely satisfactory:" *Kane v. Hibernia Ins. Co., ut supra*; *Scott v. Ins. Co.*, 1 Dill., 105; *Huchberger v. Ins. Co.*, 4 Biss., 265.

The charge in this case may be fairly construed to mean, that, in view of the serious charges of moral dereliction, they must be established clearly, and to the entire satisfaction of the jury, otherwise the presumption of innocence and proof of good character should prevail. Undoubtedly the litigant is entitled, upon request, to have the jury instructed that the rule with respect to the quantum of proof in a criminal case is not to be applied in a civil case, although the issue and the proof involve a charge of crime. But if he ask for no such charge, and the charge made does not amount to the criminal rule, he has no right to complain.

We cannot say in this particular case that the charge is so erroneous as to require a reversal of the judgment. It will therefore be affirmed.

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THOMAS B. COFFEE v. THE STATE.

CRIMINAL LAW. *Unlawful weapons. Self defense.* The courts cannot, merely upon the ground that the defendant was acting in self defense, sanction the use of an unlawful weapon in an unlawful manner, nor will this Court revise the action of the trial judge in inflicting punishment left by law to his discretion, except in a case of gross abuse of that discretion.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby County. L. B. HARRIGAN, J.

L. E. WRIGHT for Coffee.

Attorney-General LEA for The State.

COOPER, J., delivered the opinion of the Court.

The plaintiff in error was indicted and convicted for carrying a pistol, other than an army or navy pistol, concealed about his person, in the streets of Memphis. The Court sentenced him to confinement in the county workhouse for sixty days and fined him fifty dollars.

The defendant appealed in error.

The bill of exceptions shows that the defendant was found on the street with a pistol concealed about his person, as charged, and that the pistol

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was not such as is used in the army or navy of the United States. It further appears that the defendant is a peaceable man, not in the habit of unlawfully carrying weapons; that his life had been threatened within the previous hour by a dangerous and violent man, who was in the wrong, and that the defendant sent for the pistol and armed himself for the purpose of self defense.

Upon these facts, an earnest and able argument has been made on behalf of the defendant, that the judgment should be reversed and a *nolle prosequi* entered. But it is too clear for argument that the Courts cannot, merely upon the ground that the party was acting in self defense, sanction the use of an unlawful weapon in an unlawful manner, the intent to use it being clearly shown: *Day v. State*, 5 Sneed 496.

The law prescribes the mode in which the person of the citizen may be protected. And if a party chooses to rely upon his rights of self defense, he must take care, at his peril, to use a lawful weapon in a lawful manner.

It is true the facts disclosed may greatly extenuate the offense and justify the trial Judge in remitting the discretionary part of the punishment. This Court cannot, however, supervise the discretion except in a plain case of abuse. The action of the Court below may be influenced not merely by the circumstances of the particular case, but by the necessity of suppressing the commission of that class of offences in the community.

Phoenix Ins. Co. v. Day.

As the facts appear on paper, there are circumstances in this case which do extenuate the guilt of the defendant. They have doubtless been duly weighed by his Honor, the trial Judge, and may be again when the cause is remanded.

Affirm the judgment.

PHOENIX INSURANCE COMPANY v. J. S. DAY.

CHANCEBY PLEADING AND PRACTICE. *Demurrer, bad in part is bad altogether.* The Court will not depart from the general rule that a demurrer bad in part is bad altogether, where a decision of the matter of demurrer might give one party an unconscientious advantage, and the case presented by the bill is proper for equitable examination, although the complainant has been negligent in making defense at law.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

ESTES & ELLETT for Complainant.

GANTT & PATTERSON for Defendant.

Phoenix Ins. Co. v. Day.

COOPER J., delivered the opinion of the Court.

The Chancellor overruled a demurrer to the bill, but permitted the defendant to appeal.

On the 29th of April, 1875, defendant recovered a judgment by default at law against complainant on a check purporting to be drawn on the 16th of September, 1873, by complainant's then secretary, in favor of defendant. The bill charges that when this check was drawn the defendant and said secretary were engaged jointly in secret operations in stocks, and that said check was given as a memorandum of advances by defendant in said speculations; that the secretary had no authority to draw checks for such a purpose, or to appropriate the money of the company to his private use; that upon a settlement between defendant and said secretary, about the 15th of August, 1873, of their speculations, it was found that the secretary had used the funds of the company in said operations to the amount of \$8,600, and defendant executed his note to complainant, dated of that date, for \$4,300, his share of these losses, and deposited the same, with certain stocks and bonds, as collateral security for its payment, in the hands of the secretary for the benefit of the company, which were entered on its books; that shortly afterwards, and before his defalcations were discovered, the secretary was fraudulently induced by the defendant to surrender the note and securities to him.

The bill seeks to set aside the judgment at law,

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and to hold the defendant liable for the note and securities. The defendant is, and has been since its organization, a director of the complainant.

The demurrer to the bill is general, assigning for causes, that no sufficient excuse is shown for not having made defense at law; that the remedy is at law, and the bill multifarious.

By the Code, sec. 4327, the uniting in one bill of several matters of equity, distinct and unconnected, is not multifariousness. The bill is therefore, not multifarious. Nor has it been disputed that the complainant might, in equity, hold one of its directors liable for any of its assets surreptitiously obtained. There is, then, equity in the bill, and the other causes of demurrer which go exclusively to so much of the bill as relates to the judgment at law, being assigned as a demurrer to the whole bill, are too broad, and were properly overruled. The settled rule of chancery practice is, that a demurrer bad in part must be overruled altogether: *Fay v. Jones*, 1 Head, 442; *Bettick v. Wilkins*, 7 Heis., 312.

This Court has occasionally, since the passage of the Act authorizing an appeal by permission of the Chancellor from his ruling on the demurrer, felt at liberty to so far depart from the rule as to determine questions involved, when the decision would greatly narrow the litigation, and would be to the interest of both parties: *Riddle v. Motley*, 1 Lea, 468. The reason for this exception does not apply in the present case. For, a decision sus-

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taining the Chancellor's decree would not narrow the litigation, and, while a contrary ruling would have that effect, it would not be to the interest of both parties, and might give the successful party an unconscientious advantage.

The check on which the judgment was recovered was secretly retained by the defendant until the middle of October, 1874. The complainant refused to recognize its liability, and suit was brought by summons executed on the 26th of December, 1874. The Board of Directors was advised by the President of the service of the writ. It was then, the bill says, the duty of the secretary to notify the counsel "previously retained." The Board expected he had done so. About that time, however, the then secretary became a defaulter, and was discharged. He did not notify the counsel, and told his successor that he "expected the suit was dropped," and complainant "believes that he honestly thought so," having been confidentially informed by his predecessor of the real nature of the transaction. So it was, no notice was given to counsel, and the judgment by default was taken.

These facts do show negligence on the part of the complainant in making its defence at law. And we are not prepared to say that a director of a corporation who has brought suit against it for an individual demand, is, merely because he is a director, bound to notify the corporation of every step he proposes to take in his suit, or estopped to proceed therein in due course of law. He can-

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not complain, however, if the Court set-off his negligence in his pleading in equity against his adversary's negligence in pleading at law, and give a hearing on the merits.

The check sued on is alleged to have grown out of the joint operations in stocks of himself and the secretary who gave it, in which the funds of the company were used. This was a plain violation of his duty as a director. It is a proper case, under all the circumstances, for a trial of all the matters of the bill in the Court of Chancery.

The Chancellor's decree will be affirmed, with costs, and the cause remanded for an answer.

4L	251
9L	605
14L	280

SYLVIA D'ARUSMENT v. HENRY T. JONES et al.

ADMINISTRATION. *Upon the estate of a person alive, void.* Administration upon the estate of a living person is absolutely void.

FROM SHELBY.

Appeal from the Chancery Court at Memphis,
R. J. MORGAN, Ch.

D'Arusment v. Jones.

W. M. RANDOLPH for Complainant.

HUMES & POSTON, GEORGE GILLHAM and ESTES & ELLETT for Defendants. ,

McFARLAND, J., delivered the opinion of the Court

The question in this case is the validity of an administration upon the estate of a living person.

The complainant files this bill to have satisfaction of four notes for \$1,000 each, executed to her by William C. Harrison on the 15th of January, 1861, and secured by a deed of trust on a tract of land in Shelby county, which she on that day had sold and conveyed to said Harrison. She states that soon after the date of said transaction she left the State of Tennessee, and resided for several years in the States of the North, and afterwards in Europe, returning to this State shortly before the filing of this bill, April 25th, 1874. Upon her return she discovered that during her absence, to-wit. on the 10th of August, 1869, the defendant, David Whitly, had procured letters of administration upon her estate from the County Court of Shelby county, upon the pretext that she was dead, and as such administrator had filed a bill in the Chancery Court of said county against the personal representative and devisee of said Harrison (who had died) and the heir of the trustee in the deed of trust (who had also died) to have satisfaction of said notes, alleging that they had been lost or mislaid.

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The cause was compromised, and a decree rendered in favor of said Whitly for \$3,500, upon condition that he execute a bond with surety to indemnify the estate of said Harrison, or the devisees of said land, to the extent of said sum of \$3,500, against all claims that might be set up by complainant, if alive, or by any assignee of said note. The bond was executed and the money paid. The prayer of the bill is to have satisfaction of the notes out of the trust property, but that Whitly and his sureties be held liable upon his aforesaid bond to the extent of the penalty thereof, in exoneration of the land.

It is conceded that the material allegations of the bill have been established, but it is maintained that Whitly acted in good faith and with due caution upon the belief that complainant was in fact dead, a belief justified by the fact that she had been absent for more than seven years, and the most diligent inquiries among her friends and acquaintances could discover no trace of her, and it is insisted for the defendant that the administration of Whitly should be held so far valid as to constitute a protection to innocent parties who in good faith paid to him money due the complainant.

A similar case has never before arisen in this State, so far as we know. It is a question that has recently attracted some attention. Previous to the decision of the Court of Appeals of New York, in 1875, in the case of *Rodrigas v. East River Savings Institution*, 63 N. Y., 485, it seems

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not to have been doubted that such an administration would be absolutely void. Chief Justice Marshall said, such an act "all will admit is totally void:". *Geffoth v. Frazier*, 8 Cranch, and there are numerous dicta and several decisions to the same effect: *Binson v. Ivey*, 1 Yer., 306; *Allen v. Dundas*, 3 Term R., 125; *Wilson v. Frazier*, 2 Hum., 30; *Jochumsen v. Savings Bank*, 3 Allen, 87; Taylor on Evidence, vol. 2, secs. 1490, 1523. The case in 63 N. Y., before referred to, raises the direct question. Administration had been granted upon the estate of one who had been absent and not heard from for more than seven years, and money collected from his debtor. It turned out that he was not in fact dead, and the question was whether the payment made by the debtor was a protection against a second demand. The Judges were divided in opinion—four to three—the majority holding the payment a protection. The decision has been severely criticised by Judge Redfield in 15 Am. Law Reg. It is fair, however, to say that the opinions present that side of the question with all its force, and show that at least something may be said in its favor. The argument may be briefly stated thus: Upon proof of death, the Surrogate was compelled to act and grant administration. Proof of seven years' absence without being heard from was *prima facie* evidence of death which the Surrogate might be unable to rebut, and therefore he was compelled to act, and grant the letters of administration. Armed with these letters, the administra-

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tor could demand payment, and the debtor could not resist, and therefore, it being a payment compelled by law, the debtor ought to be protected, especially as it is the acts of the supposed decedent in remaining absent without communicating with his friends for more than seven years that causes the injury, and consequently he, rather than the debtor, ought to suffer.

The decision, however, was to some extent placed upon the Statutes of New York, which were assumed to be peculiar in this respect, that is to say, before administration can be granted the fact of the person's dying intestate shall be proven to the satisfaction of the Surrogate, who shall examine the person applying touching the time, place and manner of the death, and may examine any other persons, and for that purpose compel their attendance as witnesses.

While it is conceded that, in general, the finding by the Court of the fact upon which the jurisdiction depends is not conclusive of the jurisdiction, yet it is maintained that, as in this instance, the Court was required to *hear evidence* and *determine* the facts, the determination must be conclusive until revoked, so far as concerns third persons, who had acted upon the faith thereof. It does not seem clear that an administration granted under such a statute would in this respect be different from administration granted under a statute simply authorizing the granting of administration upon the estates of deceased persons, but it is un-

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necessary in the present case to pursue this branch of the inquiry.

The force of the argument in favor of the validity of the administration seems to apply especially to a case of this character, when the assumption of death rests upon the fact of seven years' absence without being heard from, and the hardship of requiring a debtor who has recognized an administrator appointed under such circumstances liable to a second payment, seems peculiarly pointed. It must, however, be in principle immaterial what the proof of death may be as to the effect of the judgment, whether the Court *find* or *assume* the fact of death upon proof of seven years' absence, or upon testimony of witnesses directly to the point, the question must be the same; that is to say, is the *finding* or *assumption* of the fact of death by the Probate Court conclusive until revoked by the same Court, or reversed on appeal, for we have no statute authorizing administration to be granted upon proof of seven years' absence without being heard from. It is simply a common law rule of evidence, and it has no more force than any other evidence that may turn out to be untrue. Administration granted upon such evidence is no more lawful than if granted upon false testimony of witnesses. It may be the misfortune of the parties in interest in either case that for the time being they are unable to show the real truth. In such a case there is real hardship in requiring a debtor to pay the second time,

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but such is always the effect of holding, as Courts are often compelled to do, that former judgments have been rendered without jurisdiction. The defendants in this case were unable to defeat the demand of Whitly, because they were, unfortunately, unable to prove the real truth. Such misfortune often occurs. The hardship to the debtor cannot be regarded greater than to hold the creditor bound by an administration of his estate in his lifetime. To deprive him of his property and rights by a proceeding of this character, to which, by no sort of construction, can he be regarded as a party, is a violation of first principles. It is said, however, that it is the fault of the supposed decedent in remaining absent for seven years without communicating with friends that gives rise to the presumption of death and causes the injury, and he ought, therefore, to be bound by his own act. The seven years' absence may be wilfull, or it may be the result of insanity, imprisonment, or other misfortune. The failure of friends and acquaintances to be informed as to the residence of the absent one, or that he still lives, may be the result of accident, or other cause. In what cases the conduct of a person in remaining absent and conniving at the acts of a pretended administrator should be held fraudulent and an estoppel, it is unnecessary to inquire, as such is not the present case. Whitly, to whom administration was granted as *next of kin*, turns out to be in nowise related to

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complainant, and she could not have anticipated such a proceeding, or be held to have connived at it by remaining absent. A debtor, in a case like the present, could always obtain the indemnity which in this case was obtained, by applying to a Court of Chancery, that is a bond of indemnity against the contingency of the creditor returning alive, an indemnity that, perhaps, ought to be provided by statute, and there could be no more hardship in requiring the debtor to look to such a bond for indemnity than in requiring the creditor to do so. The money, when thus paid, should be recovered back, either by the debtor who has paid it, or by the creditor who returns alive, and if the security of the bond fail, it would be as great a hardship, to say the least of it, to require the creditor to lose it as to throw the loss upon the debtor. Therefore the question of hardship is out of the way, and the fact that the administration was granted upon the proof of seven years' absence forms no exception to the general rule, and we return to the simple question, whether administration upon the estate of a living person is valid. Has a Probate Court, under our statutes jurisdiction to grant administration otherwise than upon the estates of deceased persons?

Our statutes have not the supposed peculiarity of the statutes of New York. They simply authorize administration upon the estates of *deceased persons*, and if the person be not dead, the Court would be acting *ultra vires* to appoint an adminis-

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trator. But it is said the Probate Court has jurisdiction to ascertain the fact of death, and its judgment finding that fact is conclusive until revoked or reversed. The general principle is, that the jurisdiction being conceded, the judgment is conclusive of all matters involved, but if the jurisdiction be disproven, then the judgment is void for all purposes. If it be conceded that the jurisdiction rests upon the existence of a particular fact, then it will not do to say that the finding of that fact by the Court is conclusive of its own jurisdiction. for this would be, to use a common expression, "reasoning in a circle." The judgment is conclusive, if the Court has jurisdiction, and its judgment that it had jurisdiction is conclusive of the jurisdiction. There may be, in some cases, confusion as to what constitutes the jurisdictional facts, but this would seem to be about as clear an illustration of it as could be found. That a Probate Court has assumed that a certain person is dead, and has granted administration upon his estate, when in fact he was not dead.

A similar illustration is given by Chief Justice Marshall. He says: "If by any means whatever a prize court should be induced to condemn as a prize of war a vessel which was never captured, it could not be contended that the condemnation operated as a change of property."

The proper distinction is illustrated in the case of *Allen v. Dundas*, 3 Term Rep., 125, where it was held that payment to one named as executor

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in a forged will, which had been presented and allowed in the prerogative court, was a protection against the demand of one who had procured the proceedings on the forged will to be set aside and himself appointed administrator, *this*, upon the ground that the person *being dead*, the Court had jurisdiction. But the Judges said that if the person were not in fact dead, the whole proceeding would be void. So that the jurisdiction rests upon the *fact of death*, and this being clearly shown untrue, it must result that the entire proceeding was without jurisdiction and void. For at least it sounds almost absurd to say that any man is to be bound by the judgment of a Probate Court that he is dead. The argument that the Court has jurisdiction to ascertain the fact of death is fallacious, for this must assume that the Court may decide the question either way, and if it concludes that the person is not dead, then it has no jurisdiction for any purpose. While the Court may hear evidence of the death, the fact is generally *assumed*, and if the Court undertake to put its finding of the fact in the form of a judgment, it gives it no greater validity. This conclusion is sustained by the great weight of authority. The direct question was fully considered, in a case precisely similar, by the Supreme Court of Massachusetts, and this view held by the unanimous opinion of the Court. See *Jochumsen v. Savings Bank*, 3 Allen, 87.

The principle is directly involved in the case of

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Thompson v. Whitman, 18 Wall., 457. By the laws of New Jersey it was made unlawful for anyone not at the time a resident or inhabitant of the State, to gather clams, oysters or shell fish in the waters of that State, and the law authorizes the seizure of the vessel and its forfeiture, which may be declared by any two Justices of the Peace of the county in which the seizure occurred. The suit was in the United States Court against the Sheriff who had carried away the vessel.

The defense was the judgment of condemnation of two Justices of the Peace of New Jersey, *which judgment recites the fact that the vessel had been seized in their county*. This was held not conclusive, and it being shown that the seizure *was not in the county*, the judgment of condemnation was held void.

Our own case of *Wilson v. Frazier*, 2 Hum., 30, was where administration was granted in two different counties about the same time. Judge Reese said, "the letters granted in the county other than the county of the intestate's residence were void."

Other similar cases are referred to in the case of *Jochumsen v. Savings Bank*, 3 Allen, 87. If the judgment of the Probate Court as to the residence of the intestate is free from a collateral attack, it can hardly be said that the judgment of the Court as to the death of the party can stand upon a higher ground. In fact, so far as our researches have gone, the case of *Rodrigas v.*

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East River Savings Institution stands alone, and even that decision seems to have been rendered doubtful upon a second hearing of the case. See 19 Am. Law Journal.

As a further argument against the validity of the administration, we need only see to what it would lead. If the administration was valid until revocation, as argued in the present case, then it must result that the decree of the Chancery Court in the bill filed by Whitly to collect these notes was likewise conclusive, for in that view it was a bill filed by one who was, for the time being, properly authorized to act as administrator to collect assets due the estate. The proper defendants were made, and the Court had jurisdiction of the subject matter, and the decree rendered in the cause must, in that view, be held conclusive upon all parties. But suppose the decree had been in favor of the defendants in the cause, that no such note had ever been executed, or that they had been paid, would the complainants in this cause be bound by the adjudication? Is it possible that she could thus lose her property and rights by a proceeding to which she was in no sense a party? The decree was, in fact, for only part of the debt.

Without attempting to further follow the discussion into refinements, it is sufficient to say that it will at least bring us back to the plain common sense view of the question, to which we think there is no sufficient answer, and that is, that

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there is no law for administering upon one's estate until after he is dead, and that no living man is bound by the *adjudication* of a court that he is dead. It might be different if we had a statute such as exists in Rhode Island, or such as the New York Court seems to have construed theirs to be, providing that after an absence for a given time one's estate may be administered upon as if he were dead, subject only to his right to reclaim the proceeds, in the event he return. Even then it would be a question whether this would not be depriving a man of his property without due process of law. See Albany Law Journal of May 15, 1880, p. 383. But, at any rate, we have no such statute.

We hold the entire proceedings void. We also hold Whitly and his sureties on his bond of indemnity liable, to the extent of the penalty, for the money received by him. The amount thus realized will be paid, to complainant in exoneration to that extent of the trust property: 1 Lea, 586. It appears that some of the persons to whom Whitly distributed the funds have voluntarily paid to complainant part of the amount. An account of this, as ordered by the Chancellor, will be taken, and the amount credited on the decree on the indemnity bond. Under the circumstances, we disallow interest during the war, and until June 1st, 1865, in accordance with our holding in similar cases, upon the ground that the parties were, for the time being, separated by the lines of the hostile

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armies, and occupied toward each other the relation of public enemies, between whom commercial intercourse was forbidden.

With this modification, the decree of the Chancellor will be affirmed, and the cause remanded, and the costs of this Court divided.

FREEMAN, J., delivered the following dissenting opinion:

I am unable to agree with the conclusion reached by the majority of the Court, for the following, among other reasons:

I think it a principle that runs through all our jurisprudence, that acts done by parties having *prima facie* legal authority to do them, as to third parties, are valid. The party may not be able to make good his claim to the position assumed by him, or the authority claimed, when brought directly in question, and he may be declared not entitled to it, or his authority revoked, or declared invalid, yet as to third parties acting on the faith of the apparent authority, they are protected, and the acts done as valid as if the authority was complete, or the position assumed by the party one to which he had the legal right. The case of an officer *de facto* illustrates this principle. The party who is in an office, and who assumes its functions, whether he has authority by law to do so or not, may do all the acts incident to such office, and as to third parties, they are held as

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valid and effective as the acts of an officer *de jure*. Surely the act of a court of competent jurisdiction ought to have equal validity and equal force, when the fact of want of jurisdiction does not appear on the face of its proceedings, as it does not in this case, but has to be made out by independent proof *de hors* the record. But this case is still stronger. On the facts as presented to the Court at the time of granting the letters of administration, that is, proof of absence from the country for seven years, without being heard from, the Court could not have refused to grant the letters of administration. Why? Because it had power to grant letters, on legal evidence of death of a party, and these facts constituted such evidence. When shown, the law said she was dead. It was legal proof of the fact. In law, the fact of death appeared to the Court. If administration had been refused, the applicant could have appealed to the Circuit Court, and if refused there, on these facts this Court would have reversed their action and compelled the grant. Is it possible that, on this state of facts, the act is void, and confers no authority? It might be, in such a case, that the letters would be granted on proof of a state of facts giving legal authority for the action of the Court, and under a judgment of this, the Court of last resort in the State, and that a judgment perfectly valid on its face, the only one the law allowed, and yet on the theory of the majority opinion, all the acts done under

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this judgment would be void, and third parties be held to have obeyed the judgment at their peril and in their own wrong.

Suppose the County Court had refused to grant the letters on *procedendo* and mandate from this Court, would not a mandamus be issued to compel them to do so? If on mandate to do so, after the right had been adjudged, the Justices had refused to comply, would we not commit them for contempt? Most assuredly. Can we rightfully compel a Court or anyone else to do an act not authorized by law, but forbidden by it? If it be required by law, can it be void by the same law? If so, why, and by what process of reasoning is the conclusion reached? I am at a loss to see the reason. The opinion furnishes none. The act, then, of the Court was legal when done. If so, was not the authority conferred by it also legal? What was that authority? To collect the assets, the debts due the adjudged intestate, to enforce such collection by process of law, if necessary. He could then compel the payment of these debts in this case. If so, it was the legal duty of the debtors to pay, so that we have the strange conclusion, that what the law compels a man to do, is unlawful, and where the law imposes a duty, the performance is by the same law unlawful, and the act void. If this is not self contradictory, and an argument that destroys itself, I am at a loss to see what would be. Whatsoever a proposition is stated, the opposite of which is a contradiction

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and absurd, we may be sure the proposition is true. So when we assert that of which the opposite is admitted to be true, we may be certain our proposition is false and unsustainable. Now we are compelled, on the theory of the opinion, to assert the act of granting the letters and payment by these parties was wrong, and yet admit that it was legal, and could have been compelled to have been by law, the Court and the parties could have done nohow else. With all this, we now hold both acts void and illegal, The answer to this I am unable to see, and until I do, I must dissent from the conclusions based on such premises. In reply to the radical error in the opinion, as I think, that the Court had no jurisdiction to grant letters of administration except on a dead man's estate, I need but say that the Court had jurisdiction of the question, the subject matter. Jurisdiction is conferred by law. Whether the facts on which the jurisdiction could be exercised depends on these being made to appear by proof. That was a matter for the judgment of the Court acting on the facts before it. The proof may not have been sufficient, but we are not revising that judgment, and therefore called on to weigh it. But, as I have shown, the case was made out, and on the facts the authority for its action was complete, and therefore the act, when done, was the only legal judgment that could have been rendered. This being so, on even the principle of the opinion, that in a case of death of a party

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the Court had legal authority to act, because the death was legally proven. Yet this act is held void, by reason of subsequent proof developed, and the effect declared to render all who acted under this authority illegal and void. . This involves the proposition that a third party is to obey the judgment of a Court of competent jurisdiction, valid on its face, at his peril, that peril being that it may turn out the proof was not sufficient, or after proof may show that the Court erred in what it did. This principle would be subversive of all sound policy, and compel every man to guarantee the correctness of the action of the judicial tribunals of the country. Surely the citizen ought to have some benefit from the generally conceded legal presumption in favor of the regularity of their action. The result I would reach is, that the subsequently developed facts furnish the ground for vacating or revocation of the letters, but being granted properly at the time, all acts done under their authority should be held valid.

This, it seems to me, is more in accord with sound legal analogies, and better agrees with a wise public policy. In support of this, I suggest that such cases are rare, this being the first in this Court since the existence of our State, eighty odd years. They can never occur without more or less neglect of attention to property and interest on the part of the claimant. Such neglect, and such protracted absence, without notice of whereabouts, furnishes in law the ground for such an adminis-

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tration. The party must be assumed to have acted with a knowledge of the law on this subject, and having made the case by his own negligent conduct, ought not to be allowed to aver the action of others on the fact as a wrong. The principle is that no man can assign the result of his own conduct as a legal wrong, much less hold third parties responsible for such results. This is a self-evident proposition. The theory of the majority opinion is that it may be done.

Which ought to suffer, the party who has contributed at least in some degree to the injury, or parties wholly innocent of all wrong? In fact, it may be maintained that the present complainant has made out, by her own conduct, the entire case, requiring the action of the County Court and the grant of the administration. What she did had authorized it by law. Yet she is now allowed to come in and make innocent third parties, who acted under the facts as she made them, suffer heavy loss for her gain. To this I cannot assent.

Upon petition to rehear, McFARLAND, J., said:

We have been asked to rehear this case on account of its novelty. The only additional argument offered is a review of the question in the *American Law Review*, of May, 1880. This article concedes that the weight of authority is in favor of our conclusion, and refers to additional authorities in its support that we have not had access to: *Moore v. Smith*, 11 Rich (law) S. C., 569; *Meha v.*

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Simmons, 45 Minn., 334. The author only undertakes to say that something may be said on the other side of the question, and puts forth, somewhat doubtingly, the suggestion that the jurisdiction does not depend upon the fact of death, but upon the allegation of the fact in the application for letters of administration.

If disposed to enter further with the discussion. we think it could be shown that this position is unsound. But we are content to rest our conclusions upon the reasons and authority already given

The other points in the petition have been fully considered in the foregoing opinion.

As to the interest after June, 1865, while it is true that complainant was absent with the notes in her possession, so that they could not have been paid, yet it is not shown that the defendants were ready or desired to make payment, or that they lost the interest.

Petition to rehear dismissed.

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ELIZA STILLMAN v. C. A. STILLMAN.

CHANCERY PLEADING AND PRACTICE. *Lien for solicitors' fees.* An agreement between the complainant and solicitors in the cause, in whose favor a decree had been rendered declaring a lien for specific fees on the property of the defendant, will not bind the defendant, and a subsequent decree thereon for a sale of the property for the satisfaction of claims of some of those solicitors would be erroneous as to the defendant. He has a right to stand upon the original decree, to be executed as an entirety.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

FRAZER & DENT for Complainant.

SMITH & COLLIER and HUMES & POSTON for Defendant.

COOPER, J., delivered the opinion of the Court.

Upon a former hearing of this divorce suit, upon the question of alimony, the Chancellor's decree allotting to the complainant as alimony leasehold property to the value of \$20,000, and the arrears of allowances *pendente lite*, was affirmed, with the addition "that the reasonable costs of Complainant in procuring her rights by the aid of solicitors should be included in the costs of the

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cause, to be a lien on the property in the hands of the receiver not allotted to complainant as part of her permanent alimony:" *Stillman v. Stillman*, 7 Bax., 169, 186.

The decree of this Court specified the two legal firms representing the complainant who were to have the benefit of the lien, and gave them also a lien on the property allotted as alimony for the same fees. The decree also allowed certain solicitors named liens respectively on the property not allotted as alimony, subordinate to the liens of the complainant's solicitors, for the amounts due them for professional services on behalf of the defendant.

The cause was remanded to ascertain the amount due to the complainant for arrears of allowances made to her for support and counsel fees pending the litigation; to ascertain the amounts due to her solicitors named for professional services; and with leave to the solicitors named of the defendant to take the steps necessary to enforce the lien declared in their favor.

After the remand, a decree of reference was made by the Chancellor in accordance with the decree. The Clerk and Master reported the amounts due to the several counsel named in the decree of the Supreme and Chancery Courts, and also found that the complainant was indebted to one legal firm in the sum of \$2,000, and to another lawyer, not thus named, \$250, for professional services in the divorce suit.

The complainant and the defendant filed excep-

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tions to the Clerk and Master's report, to the effect that the fees allowed to each of the solicitors of the complainant named in the decree, and to one of the defendant's solicitors, specifying him, were each "excessive and not sustained by the proof."

The Chancellor set aside the report as to the solicitors not named in the decree, overruled the exceptions, and confirmed the residue of the report, and ordered the property on which the fees had been declared a lien to be sold in satisfaction thereof, in the order directed by the decree of this Court, unless otherwise paid. This decree was rendered on the 24th of May, 1875.

On the 28th of June, 1875, a written agreement was entered into by and between the complainant and the solicitors whose fees had been allowed in the foregoing decree, and the legal firm in whose favor a fee of \$2,000 had been reported by the Clerk and Master which was stricken out by the Chancellor, by which each of these solicitors agreed to receive from the complainant so much in cash, and her two notes on time for a specified sum each, and to assign to her their several claims, with the right to enforce them and the liens given for their security. They stipulated that they would give up their liens on the property assigned as alimony, reserving, however, the right to enforce the lien on the other property to the extent of the notes unpaid.

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It was further agreed that in the event an appeal from the decree fixing the fee was taken by the defendant, and any reduction should be made in the amounts allowed, the solicitors would abate their notes in the same proportion.

On the 29th of June, 1875, a decree was entered by the Chancellor, based on this agreement, declaring the rights of the parties in accordance with its terms. This decree recites that the exception to the Clerk and Master's report in relation to the fee of \$2,000, which had not been allowed by the previous decree, was withdrawn, and "said report by agreement is confirmed," but the claim is subordinated to the other attorneys' fees. The agreement, by which the report is confirmed, is confined to the contracting parties. By the same decree, a report of the Clerk and Master, showing the amount due to the complainant for arrearages of allowance to be \$5,570.40, was ratified and confirmed, and the property, other than that allotted in alimony, ordered to be sold in satisfaction thereof.

On the 10th of March, 1877, upon motion of the two legal firms whose fees had been allowed by the decree of the 24th of May, 1875, for services on behalf of complainant, and proof that the notes given to them by the complainant under the agreement of the 28th of June, 1875, were due and unpaid, the Chancellor directed the order of sale under the previous decree to be executed

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by a sale of a sufficiency of the property to satisfy the amount due upon these unpaid notes.

The defendant prayed "an appeal in this cause," which was granted, and perfected the appeal by giving bond as required by law on the 16th of April, 1877.

By the decree of this Court the cause was remanded to ascertain the amount due to complainant for unpaid allowances made pending the litigation, and to determine the fees of the solicitors named, and subject the property in controversy in a given order to their satisfaction, under the liens declared. Strictly, the references should have been acted upon at the same time, so as to have had but one decree, and, if either party desired, one appeal. Separate reports seem to have been made, but they were both acted upon during the same term. The two decrees, of the 24th of May and 29th of June, 1875, settled the rights of the complainant and the solicitors, and would have authorized an appeal, by leave of the Court, before sale, under the Code, sec. 3157. Neither party did, in fact, pray an appeal, and, after the expiration of the term, neither an appeal nor a writ of error would lie until a sale thereunder: *Douglas v. White*, 1 Lea, 201; *Pond v. Trigg*, 5 Heis., 532; *Hume v. Commercial Bank*, 1 Lea, 45

The agreement between the complainant and the solicitors, to which, so far as appears, the defendant was no party, only affected the relative rights of the contracting parties to the fund decreed on

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the 24th of the previous month. By that agreement the complainant wholly, and the solicitors to the extent of their unpaid debt, could have enforced that decree. In either event, the decree, as against the defendant, could only be executed as an entirety. The agreement, and the decree thereon, so far as it affected his rights, were *coram non judice* and void: *Rice v. Alley*, 1 Sneed, 52; *Dillard v. Harris*, 2 Tenn. Ch., 193. The Court had no authority to affect his rights by virtue of an agreement to which he was no party.

In this view, that agreement and the decree thereon can only be looked to for the purpose of adjusting the rights of the contracting parties to the fund to be derived from the execution of the decree of sale of the 24th of May, 1875, so far as it decreed a sale of property other than that allotted as alimony. They would confer no authority to change the former decree, or to give a new decree against the defendant.

The decree of the 10th of March, 1877, if it be treated as a simple renewal of the order of sale of the 24th of May, 1875, would not authorize an appeal which would bring up the earlier decree, nor would it if treated as a new decree be binding on the defendant at all. The only effect of the appeal would be to test the validity of the decree itself: *Caldwell v. Hodsden*, 1 Lea, 45. That decree is most clearly erroneous so far as the defendant is concerned. He has a right to stand upon the decree as originally rendered. The agree-

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ment could not affect him, and would not, therefore, justify any decree whatever against him or his property. The solicitors, at whose instance it was made, can only proceed against him by executing the original decree in its entirety. The agreement may be looked to in adjusting the rights of the contracting parties in the fund realized.

The decree of the 10th of March, 1877, will be reversed, and the case remanded to stand as before the rendition of said decree. The solicitors, at whose instance it was rendered, will pay the costs thereof, and of this Court.

4L 278
15L 157

J M. POWELL v. W. G. FORD.

1. **ARBITRATION. Award. Time of Making.** It is not a good objection to an award, that it was not filed within the time prescribed by the Code, sec. 3441, where the submission provides thus: "No time is limited within which the said arbitrators shall make and file their said award, but we request and desire them to do so at the very earliest practicable moment," there being nothing to show that the award was not made at the earliest practicable moment consistent with the rights of the parties.
2. **SAME. Award to be made the decree of Chancery Court.** Where the submission agreed to be made a rule of the Chancery Court, provided that any differences between the arbitrators should be referred to a specified umpire, whose decisions "shall be final and conclusive, and the award made, and the decree based thereon, shall be in accordance with said decisions," and it was referred to the umpire to determine whether the complainant was interested, and, if so, to what extent in certain lands, his award that the complainant was entitled to an interest of one-half in the lands, and that the defendant is indebted to him, in a sum designated, for one-half of the net proceeds of the sale of the land, with interest from the date of sale, is good, the submission expressly providing that the decree, in accordance with the award, shall be a complete, conclusive and final end and termination of every item and transaction relating to the business between the parties.
3. **SAME. Arbitrators Umpire.** That there was a decision and disagreement between the arbitrators upon a matter of reference to the umpire would be *prima facie* established by the fact of reference, and would be clearly shown by the affidavits of the arbitrators, each avering that he had formed and expressed an opinion to his associate, the opinion of each being antagonistic to the opinion of the other.
4. **SAME. Award. Partial and incomplete.** An award cannot be partial and incomplete, unless it be shown that a well-founded matter of litigation, within the purview of the submission, was omitted.

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5. **SAME.** *Arbitrators. Umpire. Signing the award.* Where the submission contemplates an award by the arbitrators of the matters on which they agree, and a separate award of the umpire upon all matters on which the arbitrators differ, it is not necessary that the arbitrators and umpire shall sign one award.
6. **SAME.** *Award. Objections thereto.* Objections to an award that it is not a complete settlement and determination of all the matters submitted, and that it is not in conformity with the submission, are too general.
7. **SAME.** *Formal award.* Although the language used in a submission to arbitration may admit of the construction that after the umpire has decided matters of difference, the arbitrators are to make a formal award embodying his decisions, the failure to do so would not affect the award, the submission expressly providing that the umpire's decisions shall be final.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

H. T. ELLETT for Complainant.

ESTES & JACKSON for Defendant.

COOPER, J., delivered the opinion of the Court.

Bill filed on the 17th of April, 1869, for a partnership account. The complainant and defendant had been partners for several years, prior and up to the year 1858, in the purchase and cultivation of land in the State of Mississippi, in the construction of levees and transactions in land scrip in the same State.

The defendant answered, and such proceedings were had that on the 28th of March, 1871, the

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parties entered into a written agreement to submit the matters of litigation between them to arbitration, the submission to be made a rule of the Court in which the suit was pending, and it was so made accordingly. The arbitrators made an award of the matters as to which they agreed, and the umpire named in the submission made his award of the matters referred to him by the arbitrators. The award being in favor of the complainant, he moved the Court to make it the decree in the cause in accordance with the terms of the submission. The defendant resisted the motion, and made an application to set aside the award upon certain objections assigned.

The Chancellor set aside the award upon two of the grounds mentioned.

The complainant elected to stand upon his rights under the award, and his bill was dismissed. He appealed.

The first objection assigned is that the award was not filed within the time prescribed by the Code and by law. The law is, that if there be no time limited in the submission within which the award is to be made, the arbitrators may act at any time until their authority is revoked. *White v. Puryear*, 10 Yer., 441.

The Code, sec. 3441, is: "If the time of filing the award is not fixed in the submission, it shall be filed within eight months from the time such submission is signed, unless by mutual consent the time is prolonged." The award in this

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case was filed on the 20th of December, 1871, a little over eight months from the signing of the submission. The submission, upon this subject, makes the following provision: "No time is limited within which the said arbitrators shall make and file their said award, but we request and desire them to do so at the very earliest practicable moment." There is nothing to show that the award was not made at the earliest practicable moment consistent with the rights of the parties, and that is the time "fixed in the submission." The statute only applies when the contract is silent. There is clearly nothing in this objection.

The second objection is: "Because the umpire exceeded the authority conferred upon him by the arbitrators in deciding that said W. G. Ford is 'now indebted and to pay to the said John M. Powell the sum of \$35,600, for one-half the net proceeds of the sale of certain land, after deducting the costs and including interest from the date of sale to this time;' that under the said submission and by the award the said umpire had no authority to decide these questions."

The submission recites that: "The said parties were partners in the purchase, and sale and cultivation of lands; in the erection of levees in the State of Mississippi, and in other matters of joint interest and obligation as included in the said partnership." It further recites: "The said parties are unable to settle and adjust between themselves the rights and liabilities of the said parties respec-

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tively, the one to the other, originating in the said partnership transactions." It further recites: "A certain suit is now pending in the City of New York between the said parties, involving a settlement of the said partnership transactions. A certain other suit is pending in the Second Chancery Court of Shelby county, Tennessee, between the same parties, involving a settlement of the said partnership transactions and liabilities." The submission then proceeds thus: "The said parties, desiring speedily to terminate this litigation, and to ascertain their respective rights and liabilities, the one to the other, in consideration of the mutual promises, the one to the other, to abide by and perform the award hereinafter provided for, do hereby make and enter into the following agreement, viz.: 'All the dealings, transactions and liabilities, and all and every matter of every kind whatever, in any manner involved in the settlement of the said partnership, both of law and fact, legally or equitably, are hereby submitted to the arbitrament and final adjustment, settlement and decision of the Hon. Jacob Thompson and E. C. McDowell, Esqr. And it is further agreed that any difference that may arise between the said Thompson and the said McDowell, in regard to any matter involved in the said settlement, shall be referred to and decided by Henry T. Ellett, Esq., and his decision in regard to any such difference shall be as final and conclusive as if no such difference had existed between said

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arbitrators; and the award shall be made, and the said decree based thereon, shall be in accordance with his said decisions.' Upon the rendition and filing of their said award by Thompson and McDowell in said suit, a final decree, in accordance therewith, shall be entered therein, with like force and effect in all respects as if said decree had been made by the Chancellor, in the due course of regular proceedings without the intervention of the said arbitration. The entry of the said decree in accordance with the said award in the said suit, shall be a complete, conclusive and final end and termination of every item and transaction, relating to their said partnership between the said parties; and a copy of the said decree, certified by the Clerk of said Court, shall be absolutely conclusive in favor of either party against the further prosecution or institution of any suit or proceedings anywhere, and for all time to come, in any manner involving the said dealings, transactions or liabilities between the said parties.' On the 20th September, 1871. Thompson and McDowell drew up and signed, as arbitrators, a formal award of the matters upon which they agreed, and they submitted to the umpire certain questions "for his decision." The first of these questions is thus worded: "Whether J. M. Powell was interested, and if so, to what extent, in about 40,000 acres of land, located with Washington county scrip, bought of William Rucks by William G. Ford." The umpire, "having carefully considered the evi-

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dence on both sides, and having heard both parties," decided "that said Powell was entitled to an interest of one-half in the 40,000 acres of land, located with Washington county scrip, bought of Rucks, and that said William G. Ford is now indebted to said John M. Powell the sum of thirty-five thousand six hundred and eighty dollars, for one-half the net proceeds of the sale of said land, after deducting the costs and including interest from the date of sale.

The objection is that the point submitted was only as to the interest of Powell in the land, and did not authorize the umpire to determine the indebtedness of Ford to Powell, by reason of that interest, the land having been sold by Ford.

The objection, it will be noted, is not that the facts were not before the umpire of the sale and price received, so as to enable him to determine the amount of indebtedness. Nor is any exception taken to the amount as found. The objection seems to be, for it is not stated in the argument submitted for the defendant, that the umpire should only have declared Powell's interest in the land, leaving Ford's liability by reason of the sale thereof altogether undetermined, or that the calculation of the debt should have been left to the arbitrators. It is very clear from the submission, hereinbefore copied that it was not intended by the parties to leave any question undetermined between them growing out of the partnership transactions. The award and the decree thereon were

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to be a bar to all future litigation, and to be such as the Chancellor would have rendered without the intervention of the arbitrators. The intention of the parties would be violated by leaving any liability between them undetermined. The position cannot, therefore, be maintained that, after it had been decided that the complainant had an interest in the land, the arbitration should not find what had become of the land, and if sold by either partner, what each was indebted to the other therefor. The only doubt is whether the ulterior liability for the proceeds of sale should have been declared, and the calculation should have been made by the arbitrators instead of the umpire. The submission provides that any difference between the arbitrators in regard to any matter involved in the settlement, shall be referred to the umpire, whose decision shall "be final and conclusive, and the award shall be made and the decree based thereon shall be in accordance with the decision." It is very clear, from this language, that the parties intended that the action of the umpire should be final on the matters submitted to him, requiring no further exercise of their judicial functions on the part of the arbitrators. The language used does admit of the construction that after the umpire has decided, the arbitrators are to make a formal award, embodying his decisions. This would obviously be a mere form, and although some parts of the affidavits filed seem directed to this view, as where one of the arbitrators seems to

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mply that he expected the umpire to report to the arbitrators; yet, the objection would be merely technical, and without merit. It is sufficient, if the decision of the umpire is made the basis of the decree. And it was manifestly contemplated that his decisions should conclude the matters of difference.

The Chancellor erred in sustaining the second objection.

The third objection is: "Because the arbitrators did not discuss and decide upon the question of the complainant's interest in the 40,000 acres of land, but without a *bona fide* decision and disagreement between them on this question, the same was referred by them to the umpire. But the affidavits of the arbitrators themselves show that there was a decision and disagreement, a fact also *prima facie* established by the reference itself.

One of the arbitrators says there was no dispute about the facts, and he thought complainant entitled to an interest, and so expressed himself, and his colleague dissented. The other arbitrator says: "I expressed my opinion on the question, to-wit.: 'That Powell was entitled to no interest in the 40,000 acres.'"

These gentlemen do differ somewhat as to the conversation which took place when it was determined to submit the question to the umpire; but it is clear that each had formed and expressed an opinion different from the other. There was, beyond all doubt, a "difference" between them on

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the matter, and that was all that was required to authorize the reference.

The Chancellor again erred in sustaining this objection.

The fourth exception is: "Because the award is not a complete and final settlement and determination of all the matters submitted, but is partial and incomplete."

This objection is too general, and was properly overruled. It should have specifically pointed out the supposed omission. The only pretence for it is a statement in the affidavit of one of the arbitrators that he considered the award of the 20th of September, 1871, as conclusive, except as to a certain credit claimed by defendant, as to which it was agreed they "might alter" their conclusion. He does not say that he ever did alter his conclusion, and the explanation of the other arbitrator shows that there was no ground for altering their conclusion. The conclusion was, of course, final if it was not altered before the filing of the award on the 20th of December, 1871, it clearly appearing that there was no ground for altering it. The award could not be "partial and incomplete," unless a well founded matter of litigation within the purview of the submission, was omitted.

The fifth objection is: "Because the arbitrators have made a decision and award as to a part of the matter submitted, and the umpire as to a distinct part. The decision of the umpire should have been reported to the arbitrators, and then all should

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have signed the award." We do not so understand the law. In general, where a reference is made to two arbitrators, and in case of a disagreement, to an umpire alone, if they fail to agree and make an award, the umpire may proceed alone.

In such a case, the umpirage is in law the award of the umpire alone. *Mullens v. Arnold*, 4 Sneed, 262. In this case the submission contemplates a partial award by the arbitrators covering all the matters as to which they agree, and a separate award by the umpire on all matters as to which the arbitrators may differ.

It does not contemplate an award by the arbitrators and umpire, for that, according to the theory of the submission, which contemplates a disagreement, would be impossible.

Strictly speaking, the objection does not raise the point that the umpire should report his conclusions to the arbitrators, and that they alone should make a final award thereon. But if it did, the objection would be, as we have seen, too literal, and of no avail.

The sixth objection, that the award and decision are not in conformity with the submission, is too general, and has been properly abandoned.

"These parties have had the matters of litigation between them very thoroughly examined by judges of their own choice, eminent men, of State and National reputation, whose qualifications would compare favorably with those of the incumbents of

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our judicial tribunals, and whose opportunities for thorough investigation have been far better than is usually afforded to our overworked Judges.

The losing party has no reason to complain of anything that has been done.

His objections are none of them well taken. The decree must be reversed, and a decree rendered here in accordance with the awards, and the defendant will pay the costs of this Court.

4L 289
6L 243
16L 308

MARTIN et al. v. LINCOLN et al

WIDOW. Dower. Creditors filed bills to enforce debts against real estate, which had been paid for by the husband, but title conveyed to a third party. The wife insisted she was entitled to the property under a parol trust, as conveyed to a third party for her benefit. The husband died pending the litigation. The wife then claimed dower, by an amended pleading, in the event she failed to establish the trust. This Court held the trust could not be set up against creditors, not being in writing or registered, but that she was entitled to her dower. and was not

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estopped from asserting her right to it, by having claimed and contended for the beneficial interest under the assumed bare trust.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

T. B. TURLEY and W. M. SMITH for Complainants.

W. H. CARROLL and W. D. BEARD for Defendants.

FREEMAN, J., delivered the opinion of the Court.

An opinion was delivered heretofore in these cases, holding that the creditors of the husband were entitled to appropriate the house and lot bought by the husband and conveyed to Love (as was contended by respondents) in trust for Mary A. Lincoln, the wife.

The question is now presented as to the right of the wife to dower in the property, the husband having died pending the litigation. After his death the wife filed what is called an amended answer in substance a petition, asking that in the event her claim of the trust should be disallowed, that she be entitled to dower in the property in controversy.

This is certainly not the formal mode in which such a claim should be presented, and if the strict rules of pleading were enforced, she would be re

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quired to institute a regular proceeding to assert her right. But as the property has now to be sold, and this litigation has been in process since 1865, and if this question is left open it will seriously interfere with the price, probably, at the sale, we think it best to dispose of, it.

The case stands on the legal title in Love, with a clear resulting trust in favor of the husband, and a claim asserted by the wife in opposition to the creditors, that she was entitled to the beneficial interest by a parol trust, raised by proof that the conveyance to Love was for her. We held this parol trust could not be set up, even if proven, not being in writing and registered, as against the creditors of the husband.

We think it equally clear, however, that the creditors appropriate the property subject to such rights as the wife had by law in his estate.

The husband was equitable owner of this land. It is settled that the wife of Love, if he had died with the naked legal title in him, would not have been entitled to dower: *Ganaway v. Tarpley*, 1 Cold., 580-1.

The right claimed was under the attempted parol trust, but that has been declared invalid. If the wife of the holder of the legal title would have no dower it would seem an anomalous state of things to say that here is real estate where there is no dower right, though there should be two husbands and two wives, at their deaths. The wife of the real owner of the land must have

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this right, unless she has parted with it, or the claim of the creditors in some other way overrides it. There is nothing in the nature of the creditors' claim to do this. In fact, their claim goes on the idea that the right is yet in the husband as their debtor, which they seek to appropriate to their debts. He dying before they have effectuated their claim, they must enforce it subject to the burdens imposed upon it by law in favor of the widow. Nor can it be successfully maintained on any sound principle, that, by defeating her claim to a trust, their rights have been added to in any degree, or increased, as against the lands of the husband. This would be the result if the widow's claim to dower is rejected.

We do not think there is anything in the case to work an estoppel against her claim to dower. The right of dower is one favored in law, and it would be an extreme application of the doctrine of estoppel to apply it in this case to defeat that right.

The result is, the widow is entitled to dower in the lot, and it will be so decreed.

Winfrey v. Drake.

J. T. WINFREY v. J. S. DRAKE.

CONTRACT. Sale of land. Mistake. Defective title. Rescission. Where a contract in writing for the sale of land is executed by a deed of conveyance, in which, by oversight, a material part of the land is not embraced, and the vendor has no legal title to that part, but only, at most, an equitable right to obtain it, the vendee is entitled to a rescission unless the title is perfected before decree. The land lying in another State, the rescission will be upon condition that the complainant make a deed of reconveyance, within a reasonable time, duly probated for registration according to the laws of that State.

FROM SHELBY.

Appeal from the Chancery Court at Memphis,
R. J. MORGAN, Ch.

T. B. TURLEY, L. B. McFARLAND, and MUSE &
BUFORD for Complainant.

W. G. WEATHERFORD for Defendant.

COOPER J., delivered the opinion of the Court.

On the 27th of January, 1872, complainant and defendant entered into an agreement in writing, by which the latter agreed to sell, and the former to buy, an undivided half interest in the Ionia plantation, in Desha County, State of Arkansas, consisting of 973 acres, "more or less," for \$9,000, payable partly in complainant's own notes. On

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the 7th of February, 1872, the contract was executed by the delivery of the notes on the one part, and of a deed for the land, with covenant of title, on the other. Shortly afterwards, one Randolph, as the judgment creditor of one Johnson, a previous owner of the land, caused an execution to be issued on his judgment and levied upon part of the land sold, which part may be described in brief as S. E. qr. of sec. 20, containing about 158 44-100 acres. When this levy was made, it was discovered that S. E. qr. of sec. 20 was not included in the deed of defendant to complainant, nor in the series of conveyances under which the complainant claimed from Johnson down, each of the conveyances containing, in lieu, the N. E. qr. of sec. 20.

On the 18th of March, 1872, the complainant gave the defendant written notice of the omission, and that, unless he made him a good and valid title to the undivided half of the said S. E. qr. section, he thereby tendered possession of the land, and would proceed to file a bill for rescission. Some negotiations passed between the parties, during which the defendant, in writing, acknowledged that he understood himself as selling the quarter section in question to the complainant, and was bound to defend his title thereto. A suit was at once instituted by the defendant to enjoin the sale of the land under the Randolph execution, and to perfect his title to the land. Winfrey was at first joined as a party complainant in that suit, but

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after the commencement of this litigation his position was changed to that of a defendant. The present suit was commenced on the 16th of April, 1872, and was mainly based on the omission of the land from the deed. An amended bill was afterwards filed claiming a deficiency of title to some 48 acres of land in other parts of the tract, and an outstanding tax title.

The defendant filed a cross bill tendering a warranty deed for the S. E. qr. of sec. 20. The cause was heard on the 1st of July, 1875, and the contract rescinded. The defendant appealed. At that time, the litigation commenced in Arkansas to perfect the title was still pending.

The law regulating the rights of a vendee of land to rescission is well settled in this State, in accord with the current of authority, and it is not shown that the law is otherwise in the State of Arkansas. If the purchaser go into possession of land under a contract executed by deed of conveyance, he must rely upon the covenants of his deed, and cannot come into equity for rescission because of a defect of title except for fraud, the vendor's insolvency, or other independent equity: *Buchanan v. Alwell*, 8 Hum., 516; *Barnett v. Clark*, 5 Sneed, 435. It is otherwise when the contract is executory, in which case, even if the failure of title be for only a part, but a material part of the land, the vendee is entitled to a rescission of the entire contract: *Galloway v. Bradshaw*, 5 Sneed, 70; *Topp v. White*, 12 Heis., 168. In the absence of fraud,

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a vendee under an executory contract, who comes into equity for rescission, will be compelled to accept a title made good before final decree: *Blackmore v. Shelby*, 8 Hum., 439. He will not be compelled to take an after acquired title if there be fraud: *Woods v. North*, 6 Hum., 309. Nor a doubtful title at all: *Cunningham v. Sharp*, 11 Hum., 118; *Mullins v. Aiken*, 2 Heis., 535; *Scott v. Thompson*, 11 Heis., 310.

The contract in this case was intended to be and, if the deed had covered the entire tract, would have been executed. The S. E. qr. of sec. 20 was not, however, included in the conveyance. That quarter section, the proof shows, lay in the very center of the tract, near to the improvements, and consisted principally of cleared land, as valuable as any in the tract. The witnesses agree that it was a material part of the land sold. Not having been conveyed, the rights of the parties must be governed by the contract of the 27th of January, 1872. If the defendant had then been clothed with a good title, and had, at the filing of the bill, tendered to the complainant a deed for the land omitted, with the covenants of the deed of the 7th of February, 1872, the complainant would have been compelled to take it. So if, as I think may be conceded, there was no fraud on the part of the vendor, and he had an equitable right to obtain the legal title, and had actually acquired it previous to the final decree below, the complainant's right to rescission might have been defeated. The

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defendant clearly had no title to the land, only, at most, an equity to call for it: *McWhirter v. Swaffer*, 6 Bax., 348. He could not, under the executory contract, compel the complainant, after the defect was discovered, to take a deed for land to which he had no legal title. It was his misfortune that he could not perfect the title before the final decree. The right to rescission must relate to the filing of the bill. Only the perfecting of the legal title within time, or a new contract, could affect that right.

The decree must be affirmed, with costs, but upon condition that the complainant, within a reasonable time, make a deed of reconveyance of the land, duly probated for registration according to the laws of the State of Arkansas.

Wicks v. Sears.

M. J. WICKS et als. v. J. J. SEARS.

CHANCERY PLEADING AND PRACTICE. *Bill to remove cloud. Payment of taxes. Receiver.* In case of a bill filed to remove cloud from title, the defendant in possession failed to pay taxes. The complainant paid until a receiver was appointed on petition of complainant. Complainant's bill was ultimately dismissed on hearing. *Held:* He was entitled to be reimbursed the taxes paid by him pending the litigation out of rents in the hands of the receiver, on the principle that it was the duty of the Court to have so applied the funds, and it would have done so, had not complainant paid them. He having done so, entitles him to receive the money back on decree against him in this Court

FROM SHELBY.

Appeal from the Chancery Court at Memphis,
R. J. MORGAN, Ch.

ESTES & ELLETT and TAYLOR & CARROLL for
Complainants.

METCALF & WALKER for Defendant.

FREEMAN, J., delivered the opinion of the Court.

This case is now before us under an order of reference to the Clerk of this Court, and report by him, showing that complainant has paid the taxes on the land in controversy, during the pendency of the litigation, which commenced in 1865, for a number of years, and up to the time when

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a receiver was appointed to take charge of the property, and to pay them in the future. This was done in April, 1873, since which time said receiver has been in possession and control of the property. Before that, the respondent was in possession, but, as appears in the record, neglected and failed to pay these charges, and is probably, if not certainly, insolvent.

The case was a bill filed by complainant charging that respondent had purchased the land at a sale for Federal taxes, assessed during the war, and asking said sale be declared void.

The Chancellor decreed the sale void, but under late decisions of the Supreme Court of the United States, this Court has reversed this decree and dismissed the bill.

Complainant now insists that he is entitled to be reimbursed the taxes paid by him during the litigation, and asks this Court so to decree.

This case does not fall within the facts of the case of *Quinby & Co. v. North Alabama Coal and Transportation Co.*, 2 Heis., 596, where the complainant claimed in his bill to have been purchaser at a tax sale, and to be assignee of others who had purchased, and asked to have the title to the property declared to be in him by virtue of these purchases, as against creditors, who were proceeding to have it sold for debts of the original owners. Quinby failed to make out his claim of title, but did show he had paid the taxes, thus relieving the land of a charge on it, which would have

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taken precedence of the creditors' claims, and we held he should be reimbursed out of the fund arising from the sale. Nor, on the other hand, is it like the case of *Ross v. Mabry*, 1 Lea, 226, where the complainant sought to have a lien on the land and a sale of it, on the simple allegation that he had bought it at a tax sale, without showing even that his title was defective. In the language of Judge Cooper in that case, it was a bill for a lien going merely on the ground that the complainant had bought the land at a tax sale.

As no statement of facts is presented in the bill which brings out this question of payment of taxes, the contention of complainant must rest on other grounds, if successful. We think he is entitled to be reimbursed, as this case stands, out of any funds in the hands of the receiver. The receiver was appointed by the Court on a petition showing respondent in possession, but insolvent, and failing to pay the taxes. It would have been the duty of the Court, if complainant had not paid the taxes, to have directed them to be paid by the receiver as soon as funds came into his hands sufficient for this purpose. The property was in litigation, the title to be settled by the decree of the Court, otherwise both parties might have found themselves deprived of the property at the end of the litigation by a title acquired by a third party at a tax sale. In order to protect the title and preserve it to answer the decree in favor of the one or the other party, as the case might be, it

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was proper that the rents should have been so applied. It was so done as to the taxes accruing after the appointment of the receiver. The failure of the Court to direct an application of them to past due taxes ought not now to preclude such application. If complainant had not paid them, they would have been properly payable, or paid out of the rents in the hands of the receiver. That the complainant has paid them cannot defeat such application.

We therefore direct that so much of said fund as may be found in the hands of the receiver, after paying his compensation and necessary charges, shall be appropriated to reimburse complainant, and costs of this contest also out of said fund.

At a subsequent day of the term, the case was again brought before the Court upon the report of the receiver.

FREEMAN, J., delivered the opinion of the Court.

The question of reimbursement of complainant for taxes paid by him during the litigation was before us some weeks since. We then held, that inasmuch as it would have been the duty of the Court to have applied the rents arising from the property during the litigation to the payment of these taxes, that any funds in the hands of the receiver now should be appropriated to reimburse complainant, who had paid them. This was on the assumption that the receiver had done as he

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was directed to do—collected the rents and paid the taxes from April, 1873, when he was appointed. We have now his report, in which he shows he had received up to October, 1877, the sum of \$980, and had paid out \$911.21 for taxes, and an account for expenses, hiring horses to ride from the city to the land, and also a charge of commission to himself. If these credits were correct, it would only leave a balance of \$68.79 in his hands, which he would probably be entitled to as compensation for services. But a letter from the receiver is filed, showing that in fact he has only paid the taxes for 1873 and 1874. The balance, he says, are not paid. The taxes for these years amount to only \$265.34, leaving a large balance in his hands. On this showing it would appear that there is probably six or seven hundred dollars or more in the hands of the receiver from rents. Whatever is thus in his hands in fact must be appropriated to reimburse complainant. The taxes paid by him were a prior lien to subsequent accruing taxes. The principle on which we ordered the appropriation in the former opinion involved this. We erroneously assumed that the receiver had paid the taxes subsequently accruing, and therefore only appropriated the balance remaining after their payment. We find this has not been done. The conduct of the receiver is unwarranted, and, unless explained, will receive the reprobation of this Court, and be looked to on the question whether he is entitled to any compensation at all.

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The Clerk of this Court will call the receiver before him, and examine his accounts, requiring vouchers for all payments claimed, showing when paid, as well as when the rents were received which are reported by him as received, and report to the present term of this Court. He will notify counsel of complainant and defendant of the taking this account.

ANDERSON, Com'r, etc., v. M. McNEAL & BODDIE.

CHANCERY PLEADING AND PRACTICE. *Bill of Revivor.* A bill to revive a suit against a devisee is not a supplemental bill to revive, but an original bill in the nature of a bill of revivor, and when filed against a non-resident, without attachment of property, must be supported by proof. Code, secs. 4371-72.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

JOHN JOHNSON for Complainant.

HENRY CRAFT for Defendants.

Anderson v. McNeal.

FREEMAN, J., delivered the opinion of the Court.

This is a proceeding in the Chancery Court to sell real estate for taxes, under the statutes passed for that purpose, in a case where the property had been sold and bought in by the Superintendent of Public Instruction.

The original bill was filed against McNeal, who appeared and filed a demurrer, which was overruled. After this, McNeal died, and thereupon a bill of revivor was filed against respondent, Boddie, stating the fact of the death of McNeal, and that he had devised the property in litigation to Boddie, who is alleged to be a non-resident of the State, and publication prayed to be made. This was ordered on the 1st of November, and the defendant required to answer by the first Monday in December after.

No answer or appearance being put in, the bill was taken for confessed, and thereupon, on reference had to the Clerk to ascertain what taxes were due, and report on this, a decree was entered for sale of the property.

This bill against Boddie is styled an amended and supplemental bill to revive, but is more properly an original bill in the nature of a bill of revivor, as treated of in our books on equity pleading.

"If the transmission of the estate," says Mr. Adams' Doctrine of Equity, "is by act of the laws, as to the personal representative or heir, or

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the like, it is strictly a bill of revivor, and unless defendant show cause against it, within the time fixed, an order goes to revive. Where the transmission is by the act of the law, as to a devisee, an original bill in the nature of a revivor is to be filed, and a decree made on that to revive, and it will serve to revive the suit, if the validity of the transmission is established." Adams' Doct. Eq., top p. 774, s. p. 406.

By the Code, secs. 4371-72, bills without attachment of property, against non-residents, are among the exceptions, and the complainant proceeds after publication as if the allegations of the bill had been put in issue by an answer not sworn to, with the right to set for hearing forthwith, and in such cases, by subsequent sections, provision is made for taking proof.

In this case there is no proof of the fact of the death of McNeal, or that Boddie is the devisee. Until this is made out according to the allegations of the bill, they stand as denied by the answer of defendant. And so no ground for revivor against the alleged devisee appears, and the decree without this is erroneous, and for this cause must be reversed, with costs.

State v. Gaines.

THE STATE, *ex rel.* B. F. COLEMAN, *v.* JAMES L.
GAINES, Comptroller.

CLERKS' FEES. *On land condemned for taxes.* Where several lots of land belonging to the same person are assessed for taxes together as one body, giving, however, separate numbers, and in some instances the size of each lot, but including them all in one tract and in one valuation, and the same are condemned in the Circuit Court, the Clerk is only entitled to a fee of \$1.00 for each tract or parcel so reported and sold, and not for each lot comprising the tract or parcel.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. J. O. PIERCE, J

C. W. HEISKELL and M. D. L. STEWART for Coleman.

Attorney-General LEA for Gaines.

McFARLAND, J., delivered the opinion of the Court.

It appears that in some instances the assessor for Shelby county assessed for taxes several town lots belonging to the same person together as one body, giving, however, the separate numbers, and in some instances the size of each lot, but including them all in one body and in one valua-

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tion, the lots being, as may be interred, contiguous. They were so reported to the Circuit Court, condemned and sold, and bought in for the use of the State.

The Clerk claims \$1.00 for each lot so assessed, reported and sold. The Comptroller allowed him only \$1.00 for each body or parcel so assessed and reported. That is, where several lots were included in one assessment and valuation, so reported and sold, the Comptroller allowed but one fee, while the clerk claimed a separate fee for each lot as designated by the numbers.

Section 569 of the Code provides: "When several tracts or parcels of land belonging to the same person, lie contiguous, forming one entire tract, the whole may be included in one valuation and so extended."

The assessors have applied this rule to a body of town lots lying together. It is argued that the above section has been impliedly repealed by subsequent inconsistent statutes. The arguments to support this conclusion have not satisfied us. But, at any rate, this mode was adopted by the assessors and followed by the other officers of the State, and it is not the province of the Clerk to review their action. The statute allows the Clerk "\$1.00 for each separate tract, lot or parcel of land." What does this mean? Undoubtedly it means \$1.00 for each tract, lot, parcel or body of land included in one assessment, valuation, report and sale, and it does not mean that where several

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tracts, lying contiguous, belonging to the same person, are assessed as a whole, that the Clerk is entitled to a fee for each tract or lot included. He is only required to render the one service, and it was never intended that he should have more than one fee. If the assessment was even erroneous, he has no ground to complain. The fee was allowed to compensate him for the services rendered, and if by the error of the assessor he was only required to render the one service, there is no reason why he should have more than the one fee. But we by no means admit that the assessment was erroneous.

The argument in behalf of the Clerk is earnest and ingenious, but we think his claim is wholly unfounded. The proceeding is dismissed at his cost.

Affirmed.

Wallace v. State.

WILLIAM WALLACE v. THE STATE.

CRIMINAL LAW. *Arraignment and issue.* It is no ground for reversal of a judgment of conviction that the jury were sworn to try the issue joined before the prisoner had been formally arraigned and pleaded.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby County. T. H. Logwood, J.

L. B. HERRIGAN for Wallace.

Attorney-General LEA for The State.

MCFARLAND, J., delivered the opinion of the Court.

This is an indictment and a conviction for stealing three one hundred dollar bills, the property of Lucy Beaty.

The first objection taken is that the jury was empaneled and sworn before the prisoner pleaded to the indictment. The bill of exceptions shows that after the jury were selected and sworn the Attorney-General announced that the defendant had not been arraigned and that he had not pleaded to the indictment, Thereupon. the defendant was in due form of law, for the first time, arraigned, and

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pleaded not guilty. The jury were not sworn after the defendant pleaded not guilty.

The argument is, that at the time the jury were sworn there had been no issue formed, and therefore nothing to try, and the swearing was a nullity.

This view might be sustained, but it would be upon a very strict and literal construction of the law. In practice, a formal arraignment and plea is often dispensed with, and if a defendant should sit by and make no objection to the swearing of a jury to try him, upon the assumption that he had pleaded not guilty, it is doubtful if he should be heard to complain.

The case of *Link v. State*, 8 Heis., 252, relied upon, was where the defendant had been tried and convicted without any plea having been entered at any time during the progress of the trial. The Court, without any motion from the defendant, granted a new trial. Upon a second trial it was insisted that the former conviction was a bar. It was said that there having been no plea on the first trial, the verdict was not responsive to any issue, and the defendant had not been in jeopardy, and he was properly tried again.

In the present case, however, there was a plea of not guilty. The objection is that it was entered immediately after the jury was sworn, and not before. We think the objection too technical. The jury were sworn to try the issue, and although at that precise moment there was no issue, yet

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immediately afterward the issue was joined and the oaths of the jurors were no doubt as binding upon their consciences as if the issue had been previously formed. If a witness should give his deposition and be sworn to the truth of his testimony at the conclusion instead of at the commencement thereof, the oath no doubt would be binding, and perjury might be assigned upon it, and so we think the same rule may be applied to the present case, although it would be, no doubt, the better practice to have the jury sworn after the issue joined. Besides, the defendant in this case made no objection to the trial proceeding without the jury being re-sworn.

The second error assigned is that the defendant was, upon a former trial, acquitted of the same charge. The only difference being that in the former indictment the money was charged to be the property of Everett Harden. This was upon the assumption that said Harden was the husband of Lucy Beaty. If so, he was the owner of the money. If, however, Lucy Beaty was a single woman, then she was the owner, as charged in the present indictment. It appears that they had not been married at the time, but had been living together a number of year as husband and wife, and believed they were so, being colored people. It is argued that this constituted a common law marriage, but such marriages have never been recognized in this State. Besides, it appears that in the former trial it was decided that they were ton

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lawfully married. Upon this holding of the Court on the former trial, it is probable the defendant could not be held to have been in jeopardy.

It is also objected that the verdict is not sustained by the testimony set out in the bill of exceptions. Without discussing it, however, we think it is.

Affirm the judgment.

THE TAXING DISTRICT OF SHELBY COUNTY v. BILLY
EMERSON.

1. **PRIVILEGE TAX.** *Theater.* A license "upon the privilege of keeping a theater, opera house, or concert hall, where theatrical entertainments are given," includes entertainments given by companies hired by the proprietors or lessees, and such companies are not liable to an additional tax.
2. **SAME.** *Same.* "Theatrical entertainments" are not confined to the pure drama, but may include negro minstrel performances.

FROM SHELBY.

Appeal in error from the Circuit Court of
Shelby County. J. O. PIERCE, J.

Taxing District v. Emerson.

C. W. HEISKELL for Taxing District.

L. & E. LEHMAN for Emerson.

FREEMAN, J. delivered the opinion of the Court.

This is a case commenced by warrant, carried to the Circuit Court, seeking to charge the defendant with violation of revenue regulations in the Taxing District, by giving entertainments or concerts, the troupe being known as "Emerson's Minstrels," and under the management of defendant.

It is admitted the entertainment was given, and the company had no license, but it is also agreed that the troupe was hired by Davey & Brooks, to give performances in their theater, which said Davey & Brooks were then running as proprietors and lessees.

It is also admitted that Davey & Brooks were regularly licensed, and had paid for the same, under the 52nd sub-section of the Act of 1879. This section provides for a license "upon the privilege of keeping a theater, opera house, or concert hall, where theatrical entertainments are given, on payment of one hundred dollars, payable quarterly in advance."

The only question, it seems to us, in this case is, whether the license of Davey & Brooks to keep a theater, opera house, or concert hall, where theatrical entertainments are given, covered also, and included necessarily, the act of the parties employed by them to give such entertainments. --

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This is the real question, for it is agreed that the defendant or his troupe were employed by Davey & Brooks to give the entertainments for three nights, on terms agreed on between the parties.

On principle, it would seem that in the nature of such things, it was not understood that the managers of a theater were themselves to be the performers. On the contrary, it is necessarily the case that their business must be carried on in part, if not mostly by others. If so, the license to keep such an establishment necessarily involves the use of the usual means and agencies by which the business is conducted. As in the case of *Bell v. Watson*, 3 Lea, 328, we held that a license to carry on a livery stable included the use of hacks, horses and carriages, as necessary parts of the business.

So, in this case, the use or services of performers is essentially necessary to theatrical entertainments, without which the business could not be carried on. A licensed theater, concert hall, or opera house, would be an idle institution unless performances could be had in them, and these require trained performers, who must either be the licensees themselves or others employed by them.

As to whether the theatrical business includes minstrel performances, or only the *pure* drama, we could not say as a matter of law, probably, but the proof of parties perfectly familiar with the business shows that such is the case. They cer-

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tainly are included in the usual performances of the season in such establishments. That there might be a theater where nothing but the pure drama was exhibited, no more affects the result than the fact that there might be a livery stable where only horses were kept for hire, and no hacks or other vehicles. This would be rather a badly furnished establishment for the livery business. But from the testimony in this case, it would seem that a theatrical establishment in Memphis, or any other city of its size, that confined itself to the legitimate drama, would be as badly furnished to meet the popular taste as would the stable with no carriages.

We think the license includes and protects the employees of the managers, who furnish the entertainments, and the minstrel troupe is but an essential agency in carrying on the business licensed.

Let it be so adjudged.

Neely v. State.

J. C. NEELY v. THE STATE.

CONSTITUTIONAL LAW. *Exemption as juror.* Special exemption from service as jurors and road hands enacted in a charter of incorporation, in favor of officers and employees of the company, is class legislation, and unconstitutional.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby County. L. B. HOBIGAN, J.

HUMES & POSTON, for Neely.

Attorney-General LEA for The State.

DEADERICK, C. J., delivered the opinion of the Court.

Neely was regularly summoned as a juror at the January Term, 1880, of the Criminal Court at Memphis. He failed to attend as required, and was fined \$25, from which judgment of the Court he has appealed to this Court.

The defense relied on is that Neely was, when summoned, and still is, a director in the Memphis & Charleston Railroad Company, and that the charter granted in 1848 exempts the directors from jury service.

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It is admitted that he was and still is a director in said company, and that said company was chartered in 1848, containing the exemption stated, and that Neely believed he was not liable to perform service as a juror.

The Court held the provision of the charter granting the exemption inoperative and void, because repugnant to the Constitution.

We are of opinion that the holding of his Honor the Judge of the Criminal Court is correct. It is an attempt to pass a law for the benefit of individuals inconsistent with the general laws of the land, and purports to grant to individuals, who may be directors in said company, privileges, immunities and exemptions which are not extended to other members of the community who may be able to bring themselves within the provisions of such law, contrary to the provisions of Art. XI, sec. 8, of the Constitution.

Counsel for Neely have cited the case of *Hawkins v. Small*, 7 Bax., 193, in support of the validity of the exemption contained in the charter of said company. The case cited does sustain the position assumed, but it does not appear that the constitutionality of the provision in the charter, in that case, exempting a section hand from working on the public roads, was considered. Of course the constitutionality of the provision must have been taken for granted, otherwise the result announced could not have been attained. But the opinion does not discuss the validity of the ex-

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emption, but reaches the conclusion in favor of the exemption upon other grounds stated in the opinion. We are of opinion, however, that the case was erroneously decided, and overrule it, as it is liable to the same constitutional objections which lie against the case at bar.

Let the judgment be affirmed.

E. A. COLE, for use, etc., v. H. C. BREWER, et al.

ATTACHMENT. Assignment. Priority. A registered assignment of a judgment, without actual notice to the debtor, will not give the assignee priority over a subsequent attachment.

FROM SHRLBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

J. E. TEMPLE for Complainants.

J. R. & W. S. FLIPPIN and W. M. RANDOLPH
for Defendants.

DEADERICK, C. J., delivered the opinion of the Court.

Cole v. Brewer.

In 1875, complainant filed his injunction and attachment bill in the First Chancery Court at Memphis, to subject to the satisfaction of a judgment he had previously obtained against Brewer, the amount of a judgment Brewer had obtained in July Term, 1874, of the Circuit Court at Bartlett, against Mary Ann Chandler, executrix of W. R. Chandler, deceased.

Brewer had, in August, 1874, executed a deed of trust, or assignment in trust, to E. M. Hearn, trustee, of said judgment so recovered by him for the payment of debts due to third persons specified in the instrument. This trust deed or assignment was registered upon the day of its execution, but no notice of the transfer or assignment was given to the judgment debtor.

The question submitted for our determination is, whether the attaching creditor has priority over the debtors sought to be secured by the trust deed or assignment. And we are of opinion that he has. The Chancellor so held, and we affirm his decree, with costs.

Faust v. Levy.

J. FAUST et al. v. L. LEVY et als.

1. **CHANCERY PLEADING AND PRACTICE.** *Trustee. Additional bond. Su. eties.* Upon a bill by a beneficiary to have a trust assignee removed for fraudulent conduct, the Chancery Court has power to require the trustee to give additional bond, and to administer the trust under the direction of the Court.
2. **SAME.** *Same. Interest. Counsel fees. Cost.* The trustee in default will be charged with interest without proof of receiving it, and will not be allowed cost and counsel fees.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
F. D. STOCKTON, Ch.

T. B. EDGINGTON, for Complainants.

L. & E. LEHMAN for Defendants.

McFARLAND, J., delivered the opinion of the Court.

A. Loventhal & Co. made an assignment of their stock of goods to L. Levy, to be sold for the benefit of their creditors. Levy gave bond, and was proceeding to sell the goods, when Loventhal, one of the assignors, and part of the creditors, filed their bill to have the trustee removed and a receiver appointed to execute the trusts under the order of the Court.

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The Chancellor refused to remove the trustee, but required an additional bond, and ordered him to report his action to the Court.

After the goods were sold, and the trustee's report filed, the complainants filed a supplemental bill, charging the trustee with fraud in the sale of the goods, and praying to hold him and his sureties liable for the actual value of the goods.

The Chancellor held that the trustee was not guilty of fraud, but after reducing the amount of compensation claimed by him to \$500, found there was a balance in his hands, after allowing all credits to which he was entitled, of \$1,120.38, for which sum a decree was rendered against the trustee and his sureties, and from the decree the trustee and sureties *alone* have appealed.

In their behalf, the following errors have been assigned:

1st. That the Court had no jurisdiction to require an additional bond of the trustee; that the object of the bill was to remove the trustee, and this relief being refused, the bill should have been dismissed, and the Court having no jurisdiction to require an additional bond, the sureties on said bond are not bound thereon.

This position is wholly untenable. The bill in its allegations and prayer is broad enough to give the Court full jurisdiction to administer the trust, either by the appointment of a receiver, as prayed for, or by requiring an additional bond of the

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trustee, and by requiring him to perform his trust under the directions of the Court.

2nd. The trustee was charged with interest on the balance in his hands, without proof that he had received interest.

This was correct, as he improperly retained the amount, claiming it as compensation, when he was not entitled to it, instead of paying it out as he should have done.

3rd. The trustee was not allowed costs and counsel fees in defense of the supplemental bill.

This was also correct, as he was shown to be in default, and although the relief might have been had against him without the supplemental bill, under the circumstances, we would not disturb the action of the Chancellor in other respects.

The sum allowed him as counsel fees in the original case was amply sufficient.

4th. The sum of \$500 allowed the trustee for his services, we think, was fair compensation, in view of the time he was engaged, and the services rendered.

The complainants' counsel also complain of the decree, but they have not appealed, and besides, have not pointed out any ground upon which the decree should, in our opinion, be reversed.

Decree affirmed, appellant paying the costs.

Taxing District v. Brackett & Co.

THE TAXING DISTRICT v. H. C. BRACKETT & CO.

PRIVILEGE TAX. *License. Livery stable.* Under the Act of 1879, authorizing the Taxing District to assess and collect license tax for livery stables, and also shed yards, a licensed livery stable keeper may keep stock and vehicles under a shed without additional license.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. J. O. PIERCE, J.

C. W. HEISKELL for Taxing District.

HUMES & POSTON for Brackett.

McFARLAND, J., delivered the opinion of the Court.

The question presented in this case is not free from doubt. The 42nd sub-sec. of sec. 7, chap. 84, of the Acts of 1879, in relation to taxing districts, in the class of privileges, prescribes a tax as follows: "Upon the privilege of keeping a livery, sale or boarding stable, having twenty stalls and under, \$80, and for each additional stall until whole number shall reach forty, \$1, and every additional stall above forty, 50 cents. The 34th sub-sec. of the same Act levies a tax upon "every

Taxing District v. Brackett & Co.

keeper of a shed yard or barn used for taking care of horses, cattle or other animals, or wagons or other vehicles, for gain or profit, for each, per annum, \$50. The same Act also prohibits any one from exercising two privileges or following two pursuits or avocations under one license.

The proof shows that the defendants keep a livery stable in Memphis, for which they pay the regular license tax required by the 42nd sub-sec. of sec. 7, before referred to. Adjoining the stable they have a shed, with stalls for horses, and it is to be inferred that these stalls are counted in estimating the number of stalls upon which the tax is to be paid as prescribed. They are in the habit of keeping wagon trains from the country, stopping for a day or two in the city, in which cases they furnish room for the wagons or vehicles in their shed or yard and put the horses or mules in the stalls, and when the stalls in the main stable are full they use the stalls in the shed. They charge nothing for the wagons, but so much per head for the horses or mules, according as they or the owners furnish the feed. They had for several years been in the habit of carrying on this business under one license, and so had the other livery stables in the city. It appears, however, that there is one person who has a license as a "wagon-yard keeper," and keeps a shed yard for wagons, mules, etc., charges for the stock, but nothing for the wagons, and is the only one who is engaged in such business separate from a livery stable.

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The question is, whether the defendants are violating the law by following two occupations under one license, or does their license cover all the business in which they are engaged:

It is clear that the statute makes a clear distinction between a livery stable and a wagon-yard, and prohibits the keeping of both under one license. This is all clear enough, and without undertaking to define either, it will be readily conceded that the two establishments are essentially different, and it is furthermore apparent that the establishment of the defendants, as described in the record, is a livery stable, and not a wagon-yard. The shed adjoining the stable is none the less a part of the stable because it is called a shed. It is a shed with stalls, and included in the livery stable license, and is not a wagon shed.

Now, it is clear that under the license to keep a livery or boarding stable the defendants could keep horses or mules in any of their stalls. It can hardly be said that they are not at liberty to keep wagons, horses and mules, or horses or mules that are driven to the city with wagons. This is clearly within the business of a livery stable. It is true they also keep wagons and other vehicles, but they charge nothing for it. Have they transcended their license? It is true they entertain some of the same sort of customers that are kept at a wagon-yard proper, and transact in part the same sort of business transacted by the keeper of a wagon-yard, but it often happens that the same

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sort of business is transacted by persons following what are regarded as wholly different occupations.

It is perhaps impossible to keep the dividing line between all the occupations well marked, and confine each within his sphere, or carry out the purpose of the Legislature in sub-dividing nearly all the various occupations and claiming them as privileges.

We cannot say that the defendants have kept a wagon-yard, or engaged in a business not covered by their license. This was the judgment of the Circuit Court, and it will be affirmed.

STEPHEN PETTY v. THE STATE.

1. CRIMINAL LAW. *Witnesses face to face.* The constitutional provision that "In all criminal prosecutions the accused hath the right to meet the witnesses face to face" has reference to witnesses in support of his prosecution, and not to witnesses in his own behalf.

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2. *SAME. Affidavit for continuance. May be read as a deposition, when.* Defendant, upon a motion for a continuance, presented an affidavit as to the absence of a material witness, stating what he would be able to prove by said witness. Thereupon the Attorney-General agreed that the affidavit might be read as the deposition of the witness, but the defendant refused to agree to this. The Court thereupon overruled the motion to continue, but gave the defendant an opportunity to amend his affidavit by adding any other material facts he expected to prove by the witness, and stating that the same might be read to the jury as the deposition of a credible witness. *Held: No error.*

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby County. L. B. HERRIGAN, J.

YERGER & CROOKHAM for Petty.

Attorney-General LEA for the State.

TURNER, J., delivered the opinion of the Court.

The accused was convicted of grand larceny and sentenced to five years' imprisonment in the penitentiary. On the calling of the cause, the defendant moved a continuance, and presented his affidavit of the absence of a material witness, with a recitation of the facts he expected to prove.

The Court ruled the affidavit to be sufficient, whereupon the Attorney-General proposed to agree that the affidavit might be read as the deposition of the witness, who, it was alleged, was a non-resident. The accused refused to agree to this,

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but insisted upon a continuance. The Court overruled the motion to continue; gave permission to the defendant to amend his affidavit by the addition of any other material fact he expected to prove by the witness, and then allow it to be read as the deposition of a credible witness, announcing that he would charge the jury to consider of it as of the testimony of a credible witness. The accused still objected. A trial was had, and the Court charged as he had announced he would.

The case is before us upon the single question, had the Court the power to force a trial under the circumstances stated?

The constitutional provision that "In all criminal prosecutions, the accused hath the right to meet the witnesses face to face," has reference to witnesses in support of the prosecution, and not to witnesses on behalf of the defense. This has long been settled in this State by the statutory enactment allowing persons charged with crime to take the depositions of witnesses. That statute has been repeatedly acted upon, and held by this Court to be constitutional.

In the present case, the witness was a non-resident of the State, and not subject to its compulsory process.

When the prisoner is permitted to have the benefit of the testimony of a real or mythical witness, in language of his own, suggested and

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employed by himself, and deliberately penned by his attorney, without subjection to the test of a cross-examination, we think its admission as the testimony of a credible witness is no error of which he can complain.

Affirm the judgment.

JOHN CUBBINS v. T. S. AYRES et als.

LANDLORD AND TENANT. *Trade fixtures.* As between landlord and tenant, trade fixtures, although securely fastened to the freehold, may be removed by the tenant or his assignee, if the removal can be effected without material injury to the freehold. A stipulation in a lease that the tenant should make no "alterations or repairs," without the consent of the landlord in writing, and further, in the same sentence, that he should not remove "any repairs, improvements, additions or fixtures," was held not to apply to trade fixtures.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. J. O. PIERCE, J.

W. M. RANDOLPH, for Cubbins.

METCALF & WALKER for Ayres.

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COOPER, J., delivered the opinion of the Court.

Action of replevin by the assignee of a tenant against the landlord for certain articles placed in the leased premises for the purposes of his trade, that of the keeper of a hotel and restaurant, and which the landlord claimed as fixtures he was entitled to under the terms of the lease.

The case was tried by the Circuit Judge, without the intervention of a jury, who gave judgment for the plaintiff, except as to three articles, the bar-room counter and shelving, the office counter, and an iron safe, which he adjudged to belong to the defendant.

Both parties joined in presenting a bill of exceptions, but the plaintiff alone has appealed in error.

The safe in controversy was a large one, resting on rollers, and placed in an opening in the wall.

The opening being larger than the safe, the tenant, in order to make it appear well, had a frame or structure of wood made, fitting and securely fastened to the sides and top of the wall around the opening, and enclosing the safe within it. The safe extended beyond the wall on each side, and was so enclosed by the wooden frame or structure around it that it could not be removed without taking away the frame or structure. It was, however, not fastened to the frame, nor to the wall, nor to the floor. It could not be removed without also tearing away the office counter

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that surrounded it. The counter was circular, and was nailed to the wall and the floor. The bar-room counter was also circular at one end, and approached the wall of the building, and was nailed to the wall and the floor. The shelving was behind the counter, and was fastened by nails both to the wall and the floor.

As long ago as 1818, it was said by this Court, in substance, that the decisions in modern times had gone far, as between landlord and tenant, to consider fixtures made for the purpose of carrying on a man's trade, as not coming under the idea of fixtures becoming a part of the freehold: *Pillow v. Love*, 5 Hayw., 109. And the Court has recently recognized the fact that, as a general rule, things which the tenant has affixed to the freehold for the purpose of trade or manufacture may, although securely fastened to the freehold, be removed when the removal can be effected without material injury to the freehold, and without losing their essential character as chattels: *McDavid v. Wood*, 5 Heis., 96. This last case also notices the point which goes far to give us a clue to the labyrinth of this branch of the law, that it is not so much the manner in which the fixture is attached to the freehold which controls the rights of the parties, as the relation of the parties, the intention in attaching, and the use to which it is put: *Cannon v. Hare*, 1 Tenn. Ch., 22.

Under the circumstances of this case, in view of the law as it now stands, the plaintiff, or as-

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signee, would be entitled to the articles above mentioned, unless there is something else in the case. For these articles were most clearly trade fixtures, expressly put there for the purpose of the tenant's business, and used for carrying on his occupation. And, although the counters and shelving were securely fastened to the freehold, and the safe surrounded by wood work, put there for ornamentation, and fastened in like manner, yet there is nothing to show that they could not be removed without "material injury" to the freehold. The wooden frame work was, in reality, an attachment to the safe, and might, so far as appears, be removed without serious injury to the wall. Some injury must result, even from drawing a nail. But the question is, can the removal be effected without material injury. The exigencies of trade demand concessions in this regard which have long been yielded.

It is argued, however, that the defendant is entitled to these articles under the terms of his contract of lease with the tenant. The lease contains the following provisions, being part of a printed form in common use in the city of Memphis: "It is further agreed that no alterations or repairs shall be done to any part of said premises by said second party (the tenant) without the first party (the landlord's) consent in writing, under the penalty of double the costs necessary to put the premises in the condition they were when leased to said second party, and the said second party

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shall not, at any time, remove any repairs, improvements, additions or fixtures put on said premises, but the first party shall have and hold all of the same at the end of said lease."

The wording, it will be noticed, is peculiar, and leaves the precise object had in view in some doubt. But it seems very clear that the word "fixtures," in the connection in which it is used, was not intended to embrace trade fixtures. For, if such had been the design, the contract would have been more clearly expressed. It could scarcely be seriously contended, nor has it been in the argument, that all the trade fixtures of a large hotel and restaurant would pass to the landlord under so obscure a sentence. The Circuit Judge in this very case held that the plaintiff was entitled to all the trade fixtures except those above mentioned, some of which were as securely fastened to the freehold as those now in controversy, the large glass mirror for example.

What the parties meant by "fixtures" were such permanent ameliorations in the nature of the "repairs, improvements and additions" with which it is associated. They must be such as become actually a part of the freehold. It is a case for the application in a contract of the rule of *ejusdem generis*, so often applied in wills.

The judgment must be reversed, and a judgment rendered here for the plaintiff for the whole property, one cent damages and the costs.

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41	334
97	696
161	308

HUGH MARTIN et als v. G. W. LINCOLN et al.

HUSBAND AND WIFE. *Parol trust will not defeat creditors, when.* If a husband conveys his land, by deed absolute on its face, to another person without consideration, with an intention, subsequently made known to the conveyee, that he shall hold the land for the benefit of the wife of the conveyor, such parol trust cannot be set up against creditors of the husband. To defeat the creditors, there must be a deed or declaration of trust registered or noted for registration, as required by law.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

T. B. TURLEY and W. M. SMITH for Complainants.

W. H. CARROLL and W. D. BEARD for Defendants.

FREEMAN, J., delivered the opinion of the Court.

On 29th of April, 1861, George W. Lincoln purchased the property in controversy on Madison street, in the city of Memphis, of J. W. Rodgers. The price seems to have been between thirty-five and forty thousand dollars, which was paid by said Lincoln. He caused a deed to be made to the same to his brother-in-law, D. C. Love, who resided in the city of Nashville, the same

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being soon after registered in the county of Shelby. This deed simply conveyed the legal title absolutely to said Love. It is claimed to have been intended as a settlement by Lincoln upon his wife, Mary A. Lincoln, and that at some time after it was made, the trusts in favor of the wife were made known to said Love, and he consented to hold the same for the use and benefit of the wife. The precise time when this trust was so made known is not clearly shown in these records.

It is further claimed that Love, in September, 1864, executed an instrument acknowledging this trust to the said Mary A.

In addition, it is argued that in several answers to bills filed in other cases, and in the answer to the present bills, he acknowledged the trust, and that in some one of these ways the trust is sufficiently manifested, and so definitely made out as to be valid, and enforceable as between her and the creditors of her husband, seeking to enforce their debts in this proceeding.

These bills are filed by creditors of G. W. Lincoln, in 1865, seeking to make this lot in Memphis liable for their debts.

The theory on which most, if not all of them, go in the main, is, that the conveyance was made to Love directly, and assuming that he held the property in trust for Mrs. Lincoln; that it was but a voluntary conveyance to her, and that G. W. Lincoln was not in condition to make such a settlement on his wife, and, therefore, such

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conveyance, was fraudulent and void, as to existing creditors at least; and, in addition, it is also charged that it was part of a meditated scheme of fraud by which he conveyed his property to his brother-in-law for the benefit of his wife, with the purpose of thus covering it up, and preventing such creditors from reaching it; and being fraudulent in fact, as to existing creditors, is thought to be alike void as to subsequent creditors, after the registration of the conveyance.

As to the first proposition, that the conveyance was voluntary, and not enough means reserved to meet existing liabilities, after careful examination of the proof in these cases, we do not think it is sustained. It is not deemed necessary to go into the testimony to sustain this conclusion. It is sufficient to say that we think the evidence abundantly shows that he was *able* to meet any obligation shown against him, whether individual or as security for others up to the time of occupation of Memphis by the Federal forces, in June, 1862. In fact, the weight of the testimony would show that he so continued after his removal to Nashville, in 1863, perhaps, and until some time in the year 1864, when his banking business was broken up, and his bank suspended, caused by the failure of Kirtland & Co., of New York. The fact that one of these debts now sued on, a security debt, existed before the conveyance, cannot change this view.

We must test this matter by the state of

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things existent at the time it was made, and not by after events occurring during the perilous times of the war, when fortunes, as we know, were made and lost in a day, as the result of the changing fortunes of the strife.

As to the question of fraud in fact, we find some circumstances of suspicion on the face of the transaction, but not of sufficient weight to say that this charge is sustained.

The gravest inference in this direction is to be drawn from the conveyance having been made to Love, with no declaration of the assumed trust expressed in the face of the deed, and the fact that he knew nothing of the conveyance or purpose for some time after it was made—possibly not until September, 1864—when he executed the paper, claimed to have been a declaration or recognition of the trust. This paper will be noticed more particularly hereafter.

It is assumed to have been conveyed to Love with a parol trust for the benefit of the wife, and thus intended as a settlement. If he reserved ample means, as we think he did, to meet his liabilities, we can see no evidence in the facts shown in this record from which we can infer a purpose to defraud any existent creditors, nor to provide against future liabilities in contemplation of insolvency, in such way as to deceive those who might trust him. In this view, it was but the prudent precaution of a husband against future contingencies, such as may exist in every case

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where such a settlement is made on a wife or child by the husband or father. He had been advised by a friend in whom he seems to have reposed much confidence, thus to secure property to his wife and daughters; and probably the conveyance was made in pursuance of this advice.

The case then presented, and the question to be decided is, whether, as against creditors of the conveyor, seeking to enforce debts, a conveyance without consideration, to another, absolute on its face, but with an intention, subsequently made known to the conveyee, that he shall hold the land so conveyed for the benefit of the conveyor's wife, can give the wife the right to hold the land as against such creditors? Or it may be more shortly stated, whether such a parol trust in favor of the wife, can be set up as against the creditors of the husband, in land conveyed by the husband to another for her benefit.

We think this the real question, and that it is fairly raised on the facts stated in the bills, as well as those stated in the answer, though not made the theory of the bills, in which such facts are stated. The principle laid down by this court in *Bartee v. Tompkins*, 4 Sneed, 638-9, that where the facts are stated in the pleadings, though the ground relied on in the theory of the relief sought, is not sustained; yet, under the general prayer, relief may be granted, such as the facts stated in the pleadings and shown to exist, will justify, we think, applies in this case.

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The fact of the conveyance to Love, absolute on its face, with the claim of a parol trust in favor of the wife, is found substantial, given in all the bills, and is the distinct basis of the claim asserted by the wife in her answers.

It is also insisted that the instrument executed by Love, 23rd September, 1864, is a manifestation and declaration of the trust in writing, and we had as well dispose of this matter at this point, as anywhere else.

On looking at this instrument, we find it is, so far as its material terms are concerned, as follows: "In consideration of one dollar to me in hand paid, I hereby agree to make, or cause to be made, to Mary A. Lincoln, or her trustee, a quit claim deed for the following described lot: (giving a description of the same) in conclusion reciting that it is the same conveyed by and for J. W. Rodgers to him, the 29th of April, 1861, and registered in Shelby county."

So far from this sustaining the idea of a trust, or being a declaration of the trust in favor of Mrs. Lincoln, it goes far to raise a suspicion as to the existence of the trust now claimed to have been the original object of the conveyance, or any knowledge of it, at least, on the part of Love at this time.

In the first place, if he held under the trust, as claimed, why not execute a declaration of said trust, and thus furnish the evidence of that which had already been declared in parol?

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Why contract to convey to her or her trustee, if he was already that trustee, with the legal title in him for her benefit, as is the theory of respondent in her answer?

It might well be doubted, assuming that he was a trustee, and the parol trust valid, whether he could convey to a third party or to the beneficiary the legal title thus vested in him, and thus denude himself of the trust, no authority being pretended to this effect in the declaration of the trust originally.

Suppose the conveyance had expressed the trusts now claimed on its face, would not such a trustee be vested with the legal title, charged with the trust, so that he could not have denuded himself of it without a breach of duty, except by death or authority of a court of Chancery, or other courts having authority to receive his resignation and pass his accounts, and appoint a successor to act in his stead?

This being so, certainly a party holding the legal title, with a parol declaration of the trust, (assuming its validity for the present), would have no more authority to denude himself of the trust, or convey to another, thus appointing another trustee, than in the case of a trustee where the declaration of the trust was in writing. See Perry on Trusts, vol. 1, sec. 77. This instrument is but a contract on its face to convey, and if what we have suggested is true, it is a contract that would be a breach of trust to execute.

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But, passing from this, it does not even allude to the trust in any way, nor declare its terms. If it had been intended so to do, it would have recited the fact, that the conveyance to him had been made in trust for the benefit of Mrs. Lincoln, and that he thus held it.

The failure to make the slightest reference to the trust, is conclusive against the assumption that this can be held a declaration of the trust sought to be set up by respondent.

In addition, it is axiomatic in all cases where a trust is to be enforced, whether in writing or by parol, that it shall be clearly defined; or, to use the language of Mr. Bispham, Prin. of Eq., p. 97, in reference to trusts in writing, "The writing, however, must declare, with sufficient certainty, what the trust is." This would only be held, as a voluntary agreement on its face, to convey to Mrs. Lincoln, Love being the holder of the legal title without consideration, the purchase money having been paid by Lincoln. Nothing more appearing, it would be the same as Lincoln making this contract at this time, and it is clear, at this time, he was not in condition to have made such a settlement on his wife.

Resort must be had to the parol trust, if this trust can be sustained. As to the answers of Love and Lincoln relied on, we need but say they are after the rights of complainants sprang up, and cannot be interposed to affect them, even if otherwise good, which we need not decide.

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In addition, the trust must stand on the declaration made prior, or at the time of the conveyance: Perry on Trusts, sec. 77. Resort must be had to the assumed parol declaration of the trust, and it must stand or fall on this.

The question then is, whether the parol trust sought to be set up, under the facts of this case, can be sustained as against creditors of the husband? The question as to whether it could be enforced against Lincoln, the maker or conveyor, is not before us, and not necessary to be discussed or decided.

This precise question, we do not think, has been adjudged in our State. We have various cases where trusts have been recognized and enforced, made out by parol proof, as between the party claiming the beneficial interest and the conveyee of the legal title; but the question as between a creditor of the maker of the conveyance, and the claimant under such parol agreement for a trust, was not in these cases.

In the case of *Saunders v. Harris*, Judge Cooper delivering the opinion of the Court, refers to it as a question not necessary to be decided, and it was not discussed. It is evident, however, he saw there were difficulties in the question, but the case not calling for it, did not decide it.

It is claimed in argument that the principle settled by our cases, sustains the contention of respondent in this case.

We proceed to notice the leading cases decided

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by this Court, and ascertain their bearing on the question. It is several times stated in opinions *arguendo*, that a parol trust may be established, as to lands, as well as to personalty. Such is the language of Judge Cooper in the *Saunders* case; but it was not so decided, only an incidental remark, the case being one of a trust in slaves, that had always been treated as personalty, and the rules of law applicable to personalty applied to them.

It is proper to say here, that it is a very different question, as between a party accepting the legal title, with a verbal agreement to hold for the use of another, when that third party asks the enforcement of the trust, as against him, from the one presented in this case, when a creditor comes with his execution or a bill, seeking to subject the property to the payment of his debt. The principle and policy of our registration laws must necessarily have an important bearing in the solution of such a question.

The first case, and the leading one, we believe, on the general question is *McClanahan v. McClanahan*, 6 Hum., 99. A father conveyed lands to his son, the son being bound for him as surety, and also a creditor. The father was indebted to others. The father was old, infirm, of intemperate habits, and disqualified from judicious attention to his affairs. The son took the title, with the understanding that he should indemnify himself for debts and liabilities, pay the other debts of his

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father, and by this means save a home for the benefit of the family of the grantor. Soon after this the grantor died; the son paid off his debts, selling a portion of the land for this purpose, using means of his own also in paying the debts. The widow and heirs filed their bill to be restored to the possession of the land. The defendant admitted the trust in the answer, and submitted to an account. The Court held he was a mortgagee as to liabilities existent at the time of the conveyance, and trustee as to the balance, and decreed, after he should be reimbursed, the title should go to complainants. This case does not raise the question now before us, nor is the question of enforcing a parol trust, where it is insisted, for this cause, raised for decision in this case. The answer, as we have said, admitted the trust, and consented to the account. This case, on its facts, may well stand as the law, but gives no aid to the position maintained in the case now before us

The case of *Haywood*¹ v. *Ensley*, 8 Hum., 459, where a party, whose land was about to be sold, procured Ensley to purchase it, with an agreement that he would hold the land as security for the money advanced, and when this was repaid, the owners were to have it. The party, by this arrangement, prevented others from bidding, as well as the procurement, probably, of some other person to buy the land, and allow it to be redeemed. So that the element of a fraudulent advantage, as well as the agreement, was in this case,

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The Judge delivering the opinion says, it is true in that case, that the jurisdiction of a court of equity to enforce the execution of a trust, declared by parol in land, if plain, and unambiguous in terms, and established by clear and satisfactory evidence, is well established, and was admitted by counsel in argument, but this must be understood as applying to the case before the Court, and in view of the facts, the statement was correct. In fact, it was held to be a case of mortgage, the conveyance of the legal title being shown to have been as security for the money advanced by parol, in accord with numerous cases in our State. This is shown by the decree, as well as the prayer of the bill, which was to redeem, have an account of the rents and profits, which was ordered by the Court. This case was decided correctly, and we feel no disposition to disturb its authority, however much the writer of this opinion might himself doubt the soundness, as others of our Judges have done, of the propriety of this departure from the rule requiring titles to land to be in writing. But it is obvious this case does not meet the question we have now before us. The contest was between the parties to the agreement. The holder of the legal title had obtained a legal advantage by agreeing to permit the redemption, and it would have been a gross fraud if he had been allowed to retain this unconscientious advantage, as against parties who had reposed confidence in him. Suffice it to say no creditor was seeking

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to enforce his claim against the creator of the trust, as in this case.

These are the leading cases, and we believe the only ones where the trust was declared in real estate. They all have the element of fraudulent advantage, obtained by the holder of the legal title, making it fraudulent and iniquitous in him to seek to retain it.

The other cases are generally cases of conveyances of legal titles with parol agreement to hold as security for payment of money advanced, and the bills were to redeem. This doctrine is now well settled in our law, and need not be discussed. They were also cases of negroes, and, therefore, personal property.

None of them were cases where a creditor was seeking to reach the property, while the legal title was in the voluntary conveyee, and an assertion of claim by an assumed beneficiary by proof of a parol declaration of trust, made either at the time of the conveyance, or subsequent to it, as in this case. See the cases of *Saunders v. Harris*, 1 Head, 185; *English v. Tomlinson*, 8 Hum., 378; 10 Hum., 349.

We need not refer to other cases, such as the case of *McClellan v. McLean*, 2 Head, 687, and the cases there referred to, where a party agrees, that if property is given by will, that he will give it to such persons as are designated by the testator as the objects of his bounty. All these cases stand on the ground of fraudulent advantage,

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and the Court enforces them in favor of the beneficiaries. This is all well established.

Let us now come to the case before us. The party making the conveyance, or causing it to be made, is the debtor. It is made to Love without consideration. Assume that he agreed to hold it for her, and this proven by parol, and that, under the above cases, she might, as against him, on the ground of it being a fraud and an iniquitous advantage, compel him to hold the title for her, and at any rate he would be estopped from resisting her claim as against him. How stands the right of the creditor against this claim? In the view we take of this question, we need scarcely go into the vexed question, whether an express trust, such as the one now before us, could be created or raised in parol at common law. It is true, the seventh section of the Statute of Frauds, 29 Charles II., is not embodied in our statute. This section required that "all declarations or creations of trusts or confidences in any lands, tenements or hereditaments, shall be manifested and proved by some writing, signed by the party who is by law to declare such trust, or by his last will in writing." We need but say, that we think, from the authorities we have examined, that this was a vexed and unsettled question, at the date of the statute.

Mr. Perry, in his work on 'Trusts, vol. 1, second edition, sec. 75, refers to several text writers, such as Saunders and Lewin, who are cited as say-

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ing that uses being of a secret nature, were usually created by parol declaration, and trusts, like usages, were averable at common law, and might be declared by word of mouth, without writing. He cites Chief Baron Gilbert, however, as reconciling most of the conflicting authorities by saying: "At common law a use might have been raised by words upon a conveyance that passed the possession by some solemn act, as a feoffment; but where there was no such act, then it seems a deed declaration of the use was necessary; for as a feoffment might be made at common law, by parol, so might the uses be declared by parol. But where a deed was necessary for passing the estate itself, it was also requisite for the declaration of the uses. Thus a man could not covenant to stand seized to uses without a deed; but a bargain and sale, by parol, has raised a use."

It is probable the weight of authority is in favor of this view, and such, because the rule of an early day, though originally, when the feoffment was the almost universal mode of conveyance, it was understood that no writing was necessary, there being but little writing in England in those early days, as we know from the history of her people.

In this view, the seventh section, we take it, is to be held as passed rather to settle this disputed question, than as furnishing reason for the inference that the law had been settled otherwise, and it required the statute to change it

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But passing from this to the question before us. We take it to be settled by the policy of our registration system, from its inception down to the present time, that creditors and innocent purchasers, (that is, purchasers without notice,) stand on the same footing as to all lands owned by their debtor. Sections 2074-2075 of our Code embody these principles distinctly. The principle of the latter section, as to all estates subject to execution or other proceeding for enforcing debts is, that they shall be subject to the claims of a creditor of the grantor, unless defeated by a conveyance or instrument in writing, proved or acknowledged, and noted for registration or registered, and a *bona fide* purchaser, who gets a conveyance first, and has it registered, prevails over another less diligent.

If this be correct, we need hardly say that a purchaser from Love, without notice, who paid his money and procured a conveyance in writing, and had the same registered, would get the title over a trust like this, even if it is conceded it is well declared by parol. See cases cited, King's Digest, vol. 4, sec. 11, 655. If this be so, on what principle a creditor can be made to stand lower than a purchaser, it would be difficult to see.

But further. The estate conveyed to Love, Lincoln paying the consideration, nothing more appearing, and as the conveyance stood on the Register's books, on the facts stated, was an estate subject to execution at law, the judgment against

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Lincoln would be a lien on the land thus conveyed: 1 Hum., 491; 6 Hum., 95-6. This being so, if the principle of these statutes are to be carried out, how can the creditor be overridden, except by a conveyance, complying with the rule thus established? It is a legal estate, subject to execution or other process by a creditor. It can only, then, in fairness, be defeated by a conveyance, noted or registered, as the statute required. On what principle can we make a distinction, in favor of a party claiming the beneficial interest? It is the assertion of an unregistered title against a creditor whose rights are otherwise clear.

To make this, however, stronger, suppose this land had been sold by valid contract to a third party, and conveyed, upon full price paid, but the deed had not been registered, there can be no doubt that the creditor would have taken it. Or suppose the conveyance had been to Love in trust, with all the trusts plainly expressed on the face of the deed, would not the same result have followed? If so, on what principle can a mere parol conveyance or creation of the trusts stand higher than one in writing? There is no exception in the statute in favor of deeds with trusts and those without. There is nothing in reason or sound policy, it seems to us, that demands or permits such a distinction to be made. So that, even conceding the trust might be such an one as could be enforced, as against Love on the part of Mrs. Lincoln, to prevent a fraud, and on the

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ground of an estoppel on his part to deny her right, yet, as against a creditor she would still have a right unprotected, unless we can say under our registration system, a parol conveyance or declaration of trust shall stand higher than the most formal instrument in writing, or even one supported in addition by a valuable consideration paid to the conveyor. This would be absurd.

Without presenting other considerations on this aspect, we think these views conclusive of this case.

We therefore hold the creditors have the right to enforce their claims for the reasons stated.

It is probable we would reach the same conclusion on another principle. It is settled that the declaration of trust by the grantor must be before or contemporaneous with the conveyance: Perry on Trusts, vol. 1, sec. 77. It is also added by the same author, that the grantor cannot, after he has parted with the estate, charge it with any trust or encumbrance after such conveyance, and this is said to be the rule where parol trusts are allowed. We certainly see no evidence of a definite declaration of the trust in this, before or at the time of the conveyance to Love. It is shown that such was his purpose, but that such purpose was ever declared we very much doubt, from the whole evidence in this record. Certainly Love did not hear of it for some time after, as evidenced by his answer to the Schoonover bill, filed in 1865, where, he says, he was informed and believes it

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was so conveyed to him in trust; and then the instrument of 1864 would indicate that if he had ever known of the trust it had passed out of his mind, at that time, to say the least of it.

The result is, that the decree of the Chancellor is reversed, and a decree will be drawn in accord with this opinion. Costs to be paid out of the fund arising from sale.

4L 353
8L 149
8L 257
8L 285
15L 638

4L 352
117 91

THE STATE, *ex rel.* JOSEPH UHL, v. JAMES L.
GAINES, Comptroller.

TAX SALES. *Clerks' fees.* Section 5, Act of 1879, chapter 245, construed to mean that the State is not to pay the fees of Clerks in cases where the lands have been previously sold by the State and not redeemed at the time of second sale, but in such cases the Clerk may collect the fees from the delinquent taxpayer.

 FROM SHELBY.

Appeal in error from the Circuit Court of
Shelby County. J. O. PIERCE, J.

State v. Gaines.

J. B. & C. W. HEISKELL for Uhl.

Attorney-General LEA for The State

McFARLAND, J., delivered the opinion of the Court.

This is a proceeding by mandamus to compel the Comptroller, Gaines, to issue his warrant for the amount claimed by the relator, Uhl, for services rendered by him as Clerk of the Circuit Court of Shelby County, in relation to the sale of lands bought in for the use of the State for taxes.

The relator claims the fees allowed by the 79th section of the Act of 1873, chapter 118, that is to say, one dollar for each separate tract, lot or parcel of land sold.

On the other hand, it is claimed that the above section is repealed or modified by the 5th section of the Act of 1879, chapter 245.

It is argued that the latter Act does not operate to repeal the former, because it does not comply with sec. 17, art. 2, of the Constitution, as follows: "All laws which repeal, revive or amend former laws, shall recite in their caption, or otherwise, the substance of the law repealed, revived or amended."

This question has been determined at the present term, in the case of the *Home Insurance Co. v. Taxing District*, the majority of the Court holding that the above clause does not apply so as to ren-

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der void, acts merely inconsistent with former acts not thereby expressly repealed; or, in other words, does not prevent repeals by implication.

It remains, then, to determine the meaning of the 5th section of the Act of 1879. It is in these words: "That the Clerk of the Court be allowed the sum of \$1.00 for each tract or lot of land in the Trustee's report for docketing the same, which shall in no case be paid by the State or county, but the Clerk may collect the same of the delinquent taxpayer; *Provided*, the State has never before paid on any of said tracts or lots of land, unless the same has been redeemed by the State and sold again."

This language is certainly obscure, but we are required to give it a meaning, if we can do so consistently with a fair interpretation of the words used. To follow the most literal construction of this language, it would mean that the fees are in no event to be paid by the State or county, but the Clerk may collect them from the delinquent taxpayer in all cases except where the lands had been previously bought in by the State, and the State had paid the fees, and the land had not been redeemed, and in these cases the Clerk would not even have the right to collect the fees of the delinquent taxpayer. But this construction would be utterly inconsistent with other well defined provisions of the law.

The Trustee is required to include in his report of delinquents, not only the amount of the taxes,

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but also the *costs*, including the fees of the Clerk. This is repeated in a section immediately following the one in question, and the lands are to be sold for the taxes, penalties and *costs*, and if no one else will bid the amount, they are to be bid off for the use of the State and county at the amount of said *taxes, penalties and cost*. If redeemed by the owner, he is to include in his redemption money all the *costs*.

We cannot suppose that the Legislature meant in such cases to deprive the Clerk of all costs, or to leave him to collect the same from the delinquent. He could have no just right to collect from the delinquent, because the State having purchased for the taxes and *costs*, the costs are satisfied so far as the delinquent is concerned. To require *him* to pay the costs to the Clerk, and then pay again to the State upon redemption, would be unjust; besides, in all such cases there is no means of collecting from the delinquent, and it is for this very reason the lands are sold, and such a provision would virtually deprive the Clerk of all compensation. We cannot, with a proper respect for the Legislature, conclude that it was intended to require the Clerk to render the services, and yet deprive him of all compensation in all those cases where the lands are bought in for the use of the State and county. If the lands are redeemed, the State will receive the amount of the Clerk's fees in redemption; if not redeemed, the State will own the land, and in neither event

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is there any mode for the Clerk to collect his fees. Of course when the land is purchased by anyone else, the Clerk receives his fees out of the sum paid.

We conclude, therefore, that the Legislature could not have intended that the State is in no event to pay the Clerk's fees. The only reasonable meaning that can be given to the section is, that the State is not to pay the fees in those cases where the lands have been previously bought in by the State and not redeemed at the time of the second sale, but in such cases the Clerk may collect the fees from the delinquent. This is to make the Clerks lose their fees in cases where the lands are improperly sold the second time, unless he collect from the delinquent.

We admit that it requires a liberal transposition of the language of the section to arrive at this conclusion, but it is either this or to declare the act without meaning and void.

It is argued in behalf of the relator that the section may be construed to mean that the Clerk is to have \$1.00 for *docketing* the report, and hence it is not in conflict with the Act of 18th3. We find, however, that no additional duties are required of the Clerk, and the words "docketing the same" no doubt mean entering the report of record, the same duties previously required, and the fee is the same previously allowed, and not in addition.

The record shows the fees to which the Clerk

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is entitled upon the basis indicated, that is \$1,174, and for this sum, instead of \$3,271, as determined by the Circuit Judge, the relator is entitled to a warrant.

The judgment will be reversed and modified accordingly.

CHARLES SIMS and A. J. FOSTER v. THE STATE.

CRIMINAL LAW. *Death of Judge pending motion for new trial.* Where, after the trial and conviction of the defendant in a criminal case, and the entry of motions in arrest of judgment and for a new trial, the Judge died suddenly within a few days, and the business of the Court was brought to a close for the term by an epidemic, the motion may be heard and determined at the next term, and a statement of the evidence in the form of a bill of exceptions, agreed upon as correct by the State's Attorney and the defendant's counsel, may be looked to by the Court below, and upon appeal by this Court, in acting upon the motions.

FROM SHELBY.

Appeal in error from the Criminal Court of
Shelby County. L. B. HERRIGAN, J.

Sims v. State.

G. W. GORDON for Sims and Foster.

Attorney-General LEA for the State.

COOPER, J. delivered the opinion of the Court.

The plaintiffs were indicted, tried and convicted for threatening, by letters through the mail, injury to the property of the person addressed, with intent thereby to extort money, under the Code, sec. 4633. The trial was had, and the verdict rendered on the 9th of July, 1879, the jury assessing the punishment at two years in the penitentiary. Thereupon the defendants moved the Court in arrest of judgment and for a new trial.

In a day or two after the trial the yellow fever broke out in the city of Memphis, where the trial was had, in an epidemic form, and the Judge who tried the case was one of the earliest victims, dying on the 13th of the same month, before the adjournment of the term. The fever continued to prevail as an epidemic until late in the fall, and no business was transacted in the Court after the death of the Judge, nor was a successor appointed until after the commencement of another term.

On the 10th of December, 1879, during this term, the motions of the plaintiffs in error for a new trial and in arrest of judgment were heard, and overruled, and judgment rendered on the verdict.

The defendants tendered a bill of exceptions of what took place on the trial of the 9th of July,

Sims and Foster v. State.

1879, which was admitted by the District Attorney-General and the counsel of the prisoners to be correct, but the presiding Judge refused to sign, seal and make it a part of the record because he had no knowledge of the facts. He did, however, sign a bill of exceptions, or statement, in the record before us, showing that the bill of exceptions of the trial had been submitted to him as part of the proceedings on the motion for a new trial; that the counsel of the State and defendants admitted that the evidence on the trial was therein correctly reported, and containing the other grounds upon which the application for the new trial was rested.

The prisoners appealed in error.

In a criminal case, the defendant is entitled to his bill of exceptions of any matter of law or fact, to be taken and signed as in civil cases: Code, sec. 5247. The strict rule in civil cases is that the exception must be taken at the trial and noted by the Court, and the bill of exceptions made and signed as soon thereafter as possible, the delay being at the peril of the exceptant: Code, sec. 2968; *Ferrell v. Alder*, 2 Swan, 77. And the settled rule in this State is that the bill of exceptions must be reduced to writing and signed during the term. If not signed it cannot be treated as a part of the record: *Garrett v. Rodgers*, 1 Heis., 321. Nor can it be signed afterwards, although the signature was omitted by inadvertence on the part of the Judge: *Jones v. Burch*, 3 Lea, 748.

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The presumption, both in civil and criminal cases, is in favor of the regularity and correctness of the proceedings of the Court, and the party who asks a review must be diligent in taking all the necessary steps to secure the revision. The opposite party, even though it be the State, is not to be prejudiced by the fact that these steps have not been taken either from negligence or accident.

Pestilence, like war, disrupts society, and silences the law. It may excuse delay where there has been reasonable diligence, and demands the most careful application of rules adapted to a normal state of affairs, especially in criminal cases which involve the life or liberty of the citizen.

Fortunately, the present case comes before us in a shape which allows the attainment of the ends of justice without serious detriment to established forms. The motions in arrest of judgment and for a new trial having been made at once upon the rendition of the verdict of the jury, remained to be disposed of as soon as the business of the Court was resumed. By statute, none of the proceedings pending in the Circuit Courts of this State are discontinued by the non-attendance of the Judge at any term, or his death at any time, but, in such cases, all matters depending shall stand continued to the next succeeding term: Code, sec. 4223: *Johnston v. Ditty*, 7 Yer., 85. These motions were, therefore, properly taken up and disposed of by the Court at the next term, the statute equally applying to a Court clothed with a

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part of the jurisdiction of the Circuit Court. The Judge was, perhaps, not authorized to sign the bill of exceptions at that term, both for the reason given by him and because the trial term had expired. But the facts being agreed to by the State's Attorney, he could clearly look to the evidence embodied in the bill of exceptions, precisely as he might have looked to the same facts presented by affidavit, to see whether there was such error as to require a new trial to correct. Any person who heard the witnesses give their testimony might state the evidence under oath for the purpose. The District Attorney very properly, under the circumstances joined in agreeing to a statement of the facts. Of course, in the absence of such an exigency as occurred in this case, any other presentation of the facts than by a regular bill of exceptions, made and signed during the trial term, would be inadmissable, for the obvious reason that the failure to present them in the proper form would be inexcusable negligence.

Under the circumstances of this case, and in view of the ordinary practice of our Courts, the failure to obtain the Judge's signature was excusable. And, although it does not distinctly appear that the bill of exceptions was made out during the trial term, the failure to do so would also be excusable. The Judge below might well have looked at the facts thus presented to him in ruling upon the motion for the new trial, and this Court may now look to them.

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Upon examination of the facts, we find that the two defendants, now plaintiffs in error, were seen often together, and at the post-office about the time one of them hired the post-office box to which the letter, enclosing the money demanded, was directed to be sent.

The threatening letters were given in evidence, and do unmistakably demand money from the person to whom they were addressed, under the threat of injury to that person's property in the event of refusal. Both of the defendants are fully identified. The letters required the money asked for to be enclosed in an envelope and directed to the particular post-office box hired. One of the defendants, after he was arrested, said that a third colleague had written them, and this person, when arrested, confessed that he had written them. The other defendant said, when taken, "we had as well own up."

The verdict is well sustained by the evidence, and we see no ground for the recommendation of the jury of the defendants to the mercy of the Court and the Governor. The offense is one that well deserves punishment, especially where, as in this case, the person threatened was a woman.

There is no error in the record, and the judgment must be affirmed.

State v. Pool.

THE STATE v. S. A. POOL.

CRIMINAL LAW. *Discharge of the jury.* A jury in a criminal cause may be discharged by the Court without the consent of the accused, where they have had a sufficient length of time to deliberately, carefully and fully consider the entire case as presented by its facts and as governed by the rules of law given in charge by the Court, and there is no possibility of an agreement upon and return of a verdict, but the Court should be satisfied of the impossibility of an agreement, and the reasons for such conclusion by the Court should be set out in its order of discharge, so that a revising Court may consider them upon a plea of "once in jeopardy."

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby County. L. B. HERRIGAN, J.

Attorney-General LEA for The State.

LUKE E. WRIGHT for Pool.

TURNER, J., delivered the opinion of the Court.

The defendant was indicted in the Criminal Court of Shelby County for producing an abortion. At the January term, 1880, he was arraigned and put upon his trial. After the evidence had been introduced, and the charge of the Court submitted to the jury, it retired, on Tuesday, January 27th, to consider of its verdict. From time to time the jury reported to the Court that it could not

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agree, and never would agree. The jury was kept considering the case for two days after so reporting that it was impossible to arrive at a verdict.

On the 31st day of January the jury was sent for by the Court. The Court inquired if it had agreed upon a verdict. The reply was, "No, and there is no probability or possibility of ever agreeing upon a verdict in the case." The Court inquired whether or not there had been any change since the jury commenced to consider of its verdict. The jury replied, "No; the jury stands now the same as on the first ballot, and that each of the jurors was satisfied that the jury could never agree."

"After examining the jury fully, the Court was satisfied there was no probability of ever securing or obtaining a verdict from said jury in said case, and that to keep said jury longer in said case would be a waste of public money and a useless hardship upon the jury, and announced its purpose to discharge it."

The defendant and his counsel objected, and insisted upon keeping the jury longer.

The Court overruled the objection, withdrew a juror and ordered a mistrial.

Defendant excepted.

To any further prosecution the defendant interposed a plea of "once in jeopardy," to which was demurrer by the State. The demurrer was overruled, plea sustained and defendant discharged.

The State appealed.

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The judgment of the Court is based, as it recites, upon the case of *Mahala v. State*, 10 Yer., 535. We admit this is a very strong case in support of the defendant's claim to a discharge. That case, however, admits that there are cases in which the Court may discharge a jury in criminal cases of any grade, notwithstanding that provision of our Constitution, "that no man shall be twice put in jeopardy of life or limb for the same offense."

Now, if exceptions can be made at all, it is quite certain that all such exceptions cannot be embraced in any one case or any number of cases, but that the exceptions which may exist are to be determined upon only when the facts are fully known to and understood by the Court. Otherwise, instead of the general, broad, comprehensive constitutional inhibition just quoted, we would have well defined classes, fixed by the Constitution, to which the rule should apply. If that provision can be relaxed by construction at all, the relaxation must be given by the Courts in each case, after all the materials of that case are prepared to invoke judgment. No general rule can be laid down for the government of all cases.

In the case of *Mahala*, Judge Turley says that the causes which create the necessity for a discharge of the jury may be classed under three heads. The third one, he says, "is where there is no possibility for the jury to agree and return a verdict." Under this last head he says: "A jury

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may also not be able to agree because their minds cannot come to the same conclusion from the facts submitted to their consideration." This, he says, while it is a case of moral impossibility, does not constitute a necessity for the discharge of a jury before the time arrives when the Court must adjourn. He admits the power of the Court to discharge when it must, by law, adjourn before the jury can agree.

Let us test these rules by the case before us in connection with a case in a smaller jurisdiction. In Shelby county there are, by law, two Criminal Courts. The one at Memphis is, we may say, continuously in session. The one at Bartlett for only a few days or weeks, at three stated periods during the year. The jurisdiction of the Court at Memphis is co-extensive with the county; that of Bartlett is confined to certain civil districts. Now, if a man violates the law within the Bartlett jurisdiction, and is indicted and put upon his trial at Bartlett, it may be, under the rule laid down by Judge Turley, that the Judge of that Criminal Court, who is also Judge of the Probate Court at Memphis will, by law, have to adjourn the one Court to preside at the other, and for this cause alone may discharge the jury, though the case may not have been under its consideration but a few days, or even but a few hours, while if the indictment had been preferred at Memphis he could not legitimately discharge it in less than four months if it failed to agree.

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Again, contrast the result of the rule in its operation in the Memphis Criminal Court with its operations in some Circuit Court districts of the State. In some of the counties of the latter the Court can only continue for one week for the trial of both civil and criminal causes. There, if a criminal case is taken up late in the week, or, as frequently happens, is of a character to consume the week, or nearly so, in its trial, then we will have the anomaly that, in one county in the State the courts are compelled by law to retain a jury for three or four months, while in others it is compelled to discharge it in a few hours after the case has been submitted to it. So, we cannot think the rule, or rather the exceptions thereto, must be so rigidly interpreted as is done in *Mahala v. State*. We think the right rule is, that where there is no possibility to agree upon and return a verdict, the Court may discharge it without the consent of the accused. As said in many or quite all the cases admitting the power, "it is a delicate and highly important trust." We say it should be exercised with great and deliberate caution, and with the sole purpose and view of subserving public interest, and should never be used arbitrarily or rashly. The causes for its exercise should be plain and obvious. The Courts must be extremely careful how they interfere with a jury in charge of a criminal case.

But when it does appear that a jury has had, as in this case, a sufficient length of time to de-

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liberately, carefully and fully consider the entire case as presented by its facts, and as governed by the rules of law given in charge by the Court, and there is no possibility of its agreeing upon and returning a verdict, then we think the rule applies and the jury may be discharged. The Court must not only be satisfied of the impossibility of an agreement to a verdict, but the reasons for such conclusion should be set out in its order of discharge, that a revising court may consider them.

In this case the jury was out considering the case from the 27th to the 31st. It several times reported the impossibility of agreement, and, as appears from the record, the Court, before discharging, made a careful and critical inquiry by many questions, and was convinced of the utter impossibility of obtaining a verdict. The record sustains the correctness of his conclusion.

If, then, the impossibility did exist, what necessity was there to keep the jury together? How could a discharge then work any more injury to the accused than would a discharge at the end of months for the same cause? What good reason can be assigned for postponing the doing of a thing that must eventually be done? Is the impossibility to agree because of the nearness of the adjournment of the term any stronger than that of a radical and irreconcilable difference of opinion among jurors as to the facts and law of a case, and their respective bearings upon the case?

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If there is an impossibility of an agreement for any cause satisfactory to the minds and consciences of the Court and jury, acting and speaking in their sworn capacities, in an effort to impartially perform public duties, can we rightfully say that such impossibility may operate as an impossibility if the predicate of one certain cause, but shall not so operate if it be in affirmance of one or more causes equally controlling in influence? We are unable to take such distinctions.

The origin of the constitutional provision was the desire to keep out of our institutions a practice that had at one time grown up in England of trying offenders, or persons so accused, as often as might please those who chose to prosecute, without regard to former trials, verdicts and judgments, and was, as I think, meant to control in cases where a trial had once been had and a verdict rendered, or even prevented by fraud on, or improper interference with the rights of the accused.

I am unable to understand how one has been once in jeopardy in the sense claimed for the term here, so long as a verdict has not been rendered, and the jury has not been able, after a full and thorough investigation, to agree.

Reversed and remanded for trial.

Myers v. James.

4L 370
12L 114

M. A. MYERS v. H. M. JAMES.

1. CHANCERY PLEADING AND PRACTICE. *Exceptions to a Clerk's report.* Exceptions a Clerk's report of sale are inadmissible, which require the Court to go behind or modify the decree under which the sale was made, or to look outside of the record on which it is based.
2. SUPREME COURT PRACTICE. *A decretal order will not be modified at a subsequent term of the Court.* A decretal order will not be modified at a subsequent term by this Court, upon grounds which might and should have been urged when the order was made, nor at all after it has been executed, unless, indeed, in a very extraordinary case.
3. JUDICIARY SALES. *Inadequacy of price.* Mere inadequacy of price is no ground for setting aside a judicial sale.
4. SAME. *Clerk. Has discretion as to time of sale.* A Clerk has a discretion in selecting a day for the execution of a decree of sale, which will not be controlled except in a clear case of abuse.
5. SAME. *That creditor claims prior title is no ground for interference.* It is no ground for interfering with a judicial sale that the creditor, in whose favor the sale is ordered, insists upon a prior title to the property, under which he claims, duly recorded and mentioned in the pleadings of the cause.

FROM SHELBY.

Exceptions to Clerk's report of sale.

H. C. WARRINER for Myers.

J. M. GREGORY for James.

Myers v. James.

COOPER, J., delivered the opinion of the Court.

At the last term of this Court a decree was rendered in this cause, ascertaining the debt of the defendant against the complainant, and ordering the land in controversy to be sold by the Clerk in satisfaction thereof, for cash, in accordance with the terms of the mortgage or trust deed, executed for its security. The sale was made, under the decree, on the 8th of December, 1879, and the land struck off to the defendant, as the highest bidder, at the bid of \$5,000. The Master has reported the sale, and the defendant now asks for a confirmation of his report. The complainant objects to the confirmation, and has filed the following exceptions to the report: 1st, Because the sale was made under a decree of the Court, not by the trustee under the trust deed, and was made for cash, barring the equity of redemption. 2nd, Because the sale was made at an inadequate price. 3rd, Because the sale was made at an unfavorable time. 4th, Because the claim of a prior and superior title by the defendant, recorded in the Register's office, and otherwise generally known, prevented the complainant from raising money on the property. 5th, Because the title was clouded by the alleged claim of defendant, who insisted upon said claim so that the property might be sold at a sacrifice. 6th, Because the sale did not accurately pursue the directions of the decree in the manner or the time of the adver-

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tisement. 7th, Because the report charges the costs of sale against complainant, when, by the decree, the costs were to be charged against defendant.

Exceptions to a Master's report are allowed for the purpose of testing the question whether the report is in accordance with the decree or order directing it, and, in proper cases, sustained by the evidence on which it purports to be based. If the Master has obeyed the decree in the case of a sale, and, in other cases, has followed the weight of the testimony, exceptions are of no avail. Exceptions to a report are in the nature of a special demurrer, and must distinctly point out the discrepancy between the report and the record on which it is based: *Ridley v. Ridley*, 1 Cold., 332. A speaking demurrer is clearly bad, and speaking exceptions must be equally so, and for the same reason. The Court cannot go outside of the record to act upon them: *Goddard v. Cox*, 1 Lea, 113; *Childress v. Harrison*, 1 Bax., 410.

If a party has any ground for setting aside the report, which does not appear in the record, his remedy must be sought in some other mode than by filing exceptions. He cannot, by exceptions to a report, have the benefit of a rehearing, or of a bill of review, or of an original bill.

All of the exceptions filed in this case seek either to modify the decree or to go outside of the record on which the report must stand, except the

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sixth and seventh, and are inadmissible. The sixth exception is too vague, because it does not specifically point out the departure from the decree in the manner and the time of advertisement which is complained of. The brief of the counsel in support of this exception, suggests that the trust deed requires the advertisement of sale to be made for thirty days, and if the decree is construed to direct the sale in accordance with the trust deed, then the report shows an advertisement for a shorter period. But the direction of the decree was to sell for cash, free from the equity of redemption, as provided in the trust deed, "after advertising the said property according to law." The decree has been obeyed.

The seventh exception is based on an erroneous construction of the decree. The defendant was charged with all the costs of the cause up to the decree, but not with the costs of executing the decree occasioned by the failure of the complainant to pay the money judgment within the time prescribed by the Court.

The exceptions must be disallowed

The complainant has filed a petition, supported by a full and able argument, seeking to have the decree modified so as to give the complainant the right to redeem. But this argument should have been submitted at the last term, when the decree was rendered. No sufficient reason is given why this was not done. It would not, however, have availed the client. The direction to sell for cash

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free from the right of redemption was deliberately made, because these were the terms of the contract entered into by the parties, by which they ought to be bound, except under very peculiar circumstances, and because there had already been a long delay to the prejudice of the defendant. It would, moreover, be an extraordinary case which would justify the Court in changing the terms of a decretal order after the order had been executed. If the affidavits, presented in support of the exceptions, which have been disallowed or improperly filed, are treated as an informal petition or application for relief upon the facts therein stated, they present no sufficient ground for refusing to confirm the sale. Mere inadequacy of price can never be allowed to interfere with a judicial sale, for if it were otherwise, very few sales would ever be made.

Property, at the end of litigation, must go for what it will bring.

The Court has no right to interfere with the execution of its own decree, if fairly conducted, and, therefore, no power to indulge the unfortunate debtor.

The discretion of the Clerk in fixing the day on which a decree of sale will be executed, can only be controlled in a clear case of its abuse. As the sale is still open for advanced bids, the time when it was made was no more unfavorable than any other day between the last and the present term, when it was required to be made,

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and so far as appears, the day selected was as favorable as any. The prior title under which the defendant claimed, appeared in the pleadings, and he cannot be prejudiced by merely insisting on his rights.

The sale must be confirmed.

41	375
91	353
91	353
101	83
111	134

 H. GROTENKEMPER v. W. H. CARVER *et al.*

1. **CERTIFICATE.** *Defective probate. Amendment.* The correction of the certificate of privy examination of a married woman, under the Code, sec. 2082, may be made by the officer who took the examination, after he goes out of office, and the oath to the truth of the correction need only be made in open court without being entered on the minutes.
2. **CHANCERY PLEADINGS AND PRACTICE.** *Decree upon demurrer.* A decree upon a demurrer, if upon the merits, is as conclusive as though the facts set forth in the bill were admitted by the parties, or established by evidence, and is conclusive of everything necessarily determined thereby. But if the Court merely decides that the complainant has not stated facts sufficient to constitute a cause of action, or that the bill is liable to specific objection, such decision does not extend to any issue not before the Court on the hearing of the demurrer.

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3. *SAME. Same.* Where, therefore, a bill to foreclose a mortgage of husband and wife on the wife's realty, making the mortgage an exhibit, was demurred to on the ground that the certificate of acknowledgment to the mortgage exhibited did not state that the Clerk was personally acquainted with the bargainors, or that the wife was privately examined, and the demurrer sustained as to the wife, after which the omissions in the certificate was corrected by the Clerk, and an amended and supplemental bill filed, by leave of the Court, upon the mortgage with the corrected certificate, setting out the proceedings under the previous bill, it was held that a demurrer to the latter bill was properly overruled.

FROM SHELBY.

Appeal from the Chancery Court at Memphis,
R. J. MORGAN, Ch.

HENRY CRAFT for Complainant.

J. B. HEISKELL and WILSON & BEARD for Defendants.

COOPER, J., delivered the opinion of the Court.

On the 19th of July, 1872, the original bill in this cause was filed for the purpose of foreclosing a mortgage of certain land given by the defendants, W. H. Carver and Mary A., his wife, to secure the payment of notes then held by the complainant.

These defendants demurred, assigning as a cause of demurrer that the certificate of acknowledgment of the mortgage failed to state that the Clerk who took the acknowledgment was personally acquainted with the defendants, the bargainors, and further failed to show that the defendant, Mary

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A., was privily examined. The Chancellor sustained the demurrer so far as the wife was concerned, and dismissed the bill as to her, and overruled the demurrer as to the husband, and required him to answer the bill. This decree was made on the 7th of February, 1873.

The mortgage deed bore date of the 20th of October, 1868, and the probate of the wife's acknowledgement was defective in the particulars stated.

On the 2nd of July, 1875—the suit still pending as to the other parties—the complainant obtained an order of Court giving him leave to file an amended and supplemental bill, which was filed accordingly against Carver and wife, and other defendants. This bill sets out the fact of filing the original bill and its contents and the proceedings thereon, including the demurrer and the action of the Court thereon. It then states, by way of supplement and amendment, that the Clerk who had taken the probate of acknowledgment of the mortgage deed, had, on June 6th, 1874, gone into the Probate Court of Shelby County, in which county he was the Clerk of the County Court at the time of taking the probate, and, at the instance of the complainant, had corrected the probate so as to show that he was personally acquainted with the bargainors, and had privily examined the wife according to law, and made oath to the truth of the correction in open court before the Probate Judge, who certified the facts.

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By a subsequent amendment of this bill, made also by leave of the Court, the complainant states that the fact that the Clerk could correct the certificate came to his knowledge after the dismissal of the original bill as to Mary A. Carver, and about June 5th, 1874. The fact was stated on the face of the bill that at the time of the making of the correction of the probate, the Clerk's official term had expired, and he was no longer in office.

The defendant, Mary A. Carver, demurred to the amended and supplemental bill, assigning as causes:

1st, That the rights of the parties had been adjudged, by the decree of the 7th of February, 1873, which decree remained in full force and effect, never having been appealed from.

2nd, That the corrections were not within the statute, because made by the Clerk after his term of office had expired.

3rd, That the corrections were made after the adjudication of the rights of the parties under the mortgage.

4th, That the statute requires the corrections to be entered on the minutes of the Court.

The Chancellor overruled the demurrer, and the defendant, Mary A. Carver, was permitted to appeal.

The Code, sec. 2082, is: "If a Clerk omit any words in the certificate of a privy examina-

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tion by him taken of a married woman, touching the execution of any deed or other instrument by her executed, he may, at any time, on application of either of the parties interested, correct such error, mistake or omission, making oath in open court to the truth of such correction."

This Court has held, sustaining the decision of the Commission Court of 1875 for West Tennessee, that, under this statute, the Clerk may amend his certificate after he has gone out of office: *Vaughn v. Carlisle*, 2 Lea, 525. Other Courts, as shown by McKissick, Commissioner, in delivering the opinion of the Commission Court, have come to the same conclusion in analogous cases, under remedial statutes, intended to furnish legal evidence of an act done while in office. He cites *Avery v. Bowman*, 39 N. H., 393; *Gillman v. Stetson*, 4 Shepley, 124; *Johnson v. Donnell*, 15 Ill., 97; *Morris v. Trustees*, 15 Ill., 266.

The right to amend under the statute was extended to a foreign Notary Public, who took the acknowledgment of a husband and wife to a mortgage executed in another State, in *Brinkley v. Tomeny*, 2 Leg. Rep., 163. And in this case it was also held that the correction was good, although made after the defect in the probate had been relied on in the pleadings of a pending suit. The statute only requires an oath to be made in open court to the truth of the correction. It does not direct that the oath, or any note thereof, shall be entered on the minutes of the court, and

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we are not justified in interpolating so important a requirement into the act.

The only remaining cause of demurrer turns upon the effect of the decree dismissing the original bill as to the defendant, Mary A. Carver, upon her demurrer. It is earnestly and ably argued on the one side that the amended and supplemental bill only brings forward new evidence of the case made by the original bill—not a new case—and, therefore, the former decree is conclusive. On the other side, it is equally earnestly and ably argued that the amended and supplemental bill presents a new state of facts, upon which the Court did not pass, and that the decree on the demurrer is, consequently, not a bar. The learned counsel do not, upon a critical examination of their arguments, differ so much in their law as in its application to the particular facts of the case. A decree upon a demurrer, if upon the merits, is as conclusive as though the facts set forth in the bill were admitted by the parties or established by evidence.

It is conclusive of everything necessarily determined by the decree: *McNairy v. Nashville*, 2 Bax., 251; *Jameson v. McCoy*, 5 Heis., 108. If, however, the Court decides that the complainant has not stated facts sufficient to constitute a cause of action, and that the bill is otherwise liable to any specific objection urged against it upon demurrer, such decision does not extend to any issue not before the court on the hearing of the demurrer. It leaves the complainant at liberty to

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present his case, so corrected in form or substance, as to be no longer vulnerable to the attack made upon it in the former suit: Freeman on Judgments, sec. 267.

The bill before us was filed to foreclose a mortgage, which was appended as an exhibit. The demurrer is that the certificate of acknowledgment to the mortgage, which is an exhibit to the bill, does not state that the Clerk who took the acknowledgment, was personally acquainted with either of the defendants, or that the defendant, Mary A. Carver, then a married woman, appeared before the Clerk privately from her husband, and acknowledged the deed in the form required by law.

The demurrer, it will be noted, is not to the merits that no such mortgage as the one set out in the bill was ever acknowledged by the husband and wife.

The issue made is that the *certificate* to the mortgage exhibited does not contain the recitals necessary to make it a valid instrument as to the married woman. Nothing is put in issue except the point whether the particular certificate recited particular facts, essential to the efficacy of the conveyance to pass the land of the defendant, the married woman.

If the exhibit had been a certified copy of the mortgage, and the defect had been in the copy and not in the original, the decree sustaining the demurrer would not have been a bar to a new

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bill on the original, for the issue went only to the erroneous certificate, not to the real certificate, nor to the existence of the mortgage.

The dismissal of a bill for the specific performance of a contract for the sale of land alleged to be in parol, upon a demurrer, relying on the Statute of Frauds, would be no bar to a bill on precisely the same contract alleged to be in writing.

The effect of a dismissal of a bill on demurrer turns upon the issue made, and the apparent conflict in the decisions will, in a great measure, disappear when the cases are critically examined to ascertain the exact point decided. If the demurrer is general, and the decree only a simple dismissal, the inclination of the Courts has been, in some instances, to find that it might have gone off upon a question of jurisdiction or form, and not on the merits, so as to bar a new suit: *Love v. Freeman*, 10 Ohio St., 48; *Nicholson v. Ingram*, 24 Texas, 684; *Borch v. Funk*, 2 Met., 544.

The decree sustaining the demurrer and dismissing the bill in the case before us, cannot go beyond the issue made by the demurrer, whatever may be its form. It would only be that the certificate to the mortgage was fatally defective in the particulars pointed out. The decision could not extend, in the language of Mr. Freeman, "to any issue not before the court on the hearing of the demurrer." The decree would be no bar to the new bill treated as an original bill presenting the same mortgage with a different certificate, for the

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obvious reason that the two certificates are entirely different.

This conclusion renders it unnecessary to authoritatively decide the point, suggested by one member of the Court during the argument, that the case was probably still in court for the purpose of amendment, so far as Mary A. Carver was concerned, notwithstanding the dismissal on demurrer of the bill as to her. The law is clear that the complainant could not, as of right, appeal from that decision until the suit was disposed of as to all of the defendants: *Harrison v. Farnsworth*, 1 Heis., 751. Nor could he test its correctness by a writ of error: *Hume v. Bank*, 1 Lea, 220. When the case was finally determined, the complainant could, by appeal, vacate the decree of dismissal on the demurrer, as well as all other orders and decrees in the cause: *Morris v. Richardson*, 11 Hum., 389. If, pending the suit, he could not file an amended and supplemental bill, by reason of the estoppel of the decree of dismissal on demurrer, he would certainly have the right, after the technical estoppel is removed, by the vacating of that decree by appeal. And we should have the curious anomaly of a right, properly exercisable pending the litigation in the lower court, postponed until the suit has been finally carried to a higher court.

I am inclined to think that a defendant in court for the purpose of appeal after a decree of dismissal, is equally in court for purposes of amendment.

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A bill partially dismissed on demurrer, is open for amendment as if no demurrer had been filed: *Emans v. Emans*, 1 McCarter, 114-20.

It may also be added, that if, as contended for by the learned counsel of defendant, the amended certificate was the putting into proper form the proof actually in existence at the hearing of the original bill on demurrer, and might then have been used by proper diligence, the subsequent discovery of that proof would be a good ground for a bill of review.

The amended and supplemental bill in this case has all the essentials, although not the form of a bill of review, and was filed by leave of the Court.

The defendant has made no objection by demurrer, or otherwise, to the form, or the granting of leave to file, and it is probable this Court would, as it is so often compelled to do, look to substance, not form, and decide upon the merits accordingly.

The Chancellor's decree, overruling the demurrer, will be affirmed, with costs.

Vance v. Phoenix Ins. Co.

4L 386
9L 744

GEO T. VANCE v. PHOENIX INSURANCE COMPANY et als.

1. **CORPORATIONS. Directors.** Directors of a corporation are required to show reasonable capacity for the position, scrupulous good faith, and the exercise of their best judgment.
2. **SAME. Same. Not personally liable, when.** Directors, who act in good faith, and with reasonable care and diligence, but nevertheless fall into a mistake, either of law or fact, are not personally liable for the consequences of such mistake.
3. **SAME. Same. Same.** The by-laws of a corporation provided that the Board of Directors should elect a Secretary, whose term of office should be twelve months, or until his successor was elected, and who was to give bond with security for the faithful discharge of his duties. The Board elected a Secretary, and took the prescribed bond, and re-elected the same person Secretary for each of the two following years, but took no new bond, supposing, after consideration and discussion of the question, but without taking legal advice, that the bond taken was a continuing security during those years. The Secretary became a defaulter in the third year. *Held*: That the Directors, who were good and efficient business men, stockholders of the corporation, and acting in good faith, were not liable to make good the loss.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

HUMES & POSTON and U. W. MILLER, for Complainant.

J. M. GREGORY for Defendants.

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COOPER, J., delivered the opinion of the Court.

Bill by one stockholder of the Phoenix Insurance Company, upon the refusal of the company to bring the suit, to hold the directors of the company during the years 1872-73 individually liable for losses occasioned by their neglect to take an official bond from the Secretary of the company, in accordance with the by-laws of the corporation.

The Chancellor, on final hearing, dismissed the bill, and the complainant appealed.

By the charter of the Phoenix Insurance Company, section 31, the Board of Directors are authorized to appoint a Secretary and Treasurer, or such other officers for the management of the business of the company as may be deemed necessary by said Board of Directors, and to take from such Secretary and Treasurer, or other officers, such bonds and securities as may be prescribed by said Board of Directors.

The company organized in February, 1871, and adopted by-laws. The third by-law is: "At the first regular meeting after the election of Directors, the newly elected Board shall elect a President, Secretary and Assistant Secretary, whose term of office shall be for twelve months, or until their successors are elected."

The tenth by-law is: "The Secretary, after his election, shall give bond with satisfactory security to the Board of Directors, in the sum of thirty thousand dollars, conditioned for the faithful dis-

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charge of his duties, and a failure to give such bond shall cause a forfeiture of his office."

Other by-laws give the Secretary "special care and control over all books, papers and other documents" of the company; direct him to make regular deposits in bank of the money of the company, and authorize the money to be drawn out only on his check.

In February, 1871, the Board of Directors appointed B. F. White Secretary of the company, and took from him a bond, with satisfactory security, in the penalty of thirty thousand dollars, conditioned to faithfully perform his duty as such Secretary, and in all respects properly demean himself in his said office. White was re-elected Secretary in February, 1872, and again in February, 1873, but gave no new bond on either occasion, nor did the Board require him to renew his bond. In 1873, White became a defaulter in the sum of \$11,328.35, and also issued stock without authority, which the Board of Directors redeemed at an expense of \$3,050.

The individual defendants were stockholders and members of the Board of Directors during the years 1872-73. They received no compensation as Directors, and gave to the business of the company their personal attention, and such attention, it is agreed, as men of ordinary prudence give their own affairs. "They were all," the agreed statement of facts says, "good and efficient busi-

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ness men, several of them heads of large mercantile and manufacturing establishments."

The defendants supposed that the bond taken from White in 1871 was security for White's acts in 1872 and 1873, and so long as he acted as Secretary of the company. They considered and discussed the question of White's bond, and their conclusion was that it covered his acts for the whole time he should serve the company. In 1872 and 1873 they gave the business of said insurance company, and the sufficiency of White's bond, that care and attention which prudent men give their own affairs. They did not, however, take advice of counsel as to the sufficiency of the bond, or of its binding force, but acted on their own judgment in regard to it, until after White's defalcation occurred.

Directors of a corporation undoubtedly occupy a fiduciary relation towards the stockholders, and are bound to good faith and reasonable diligence in the performance of their duties. They are, consequently, liable for losses occasioned by their positive misconduct, or neglect which warrants the imputation of fraud, or, as it is sometimes vaguely expressed, shows a want of the knowledge necessary for the discharge of their functions so great that they were not justified in assuming the office. Where they are interested in the stock of the company, and act without compensation, they will, at the utmost, be held to answer for ordinary neglect, that is, for the omission of

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that care which every man of ordinary prudence gives to his own affairs. They do not undertake to be infallible. For error, therefore, though it be in a matter of law, they are not, in general liable. In fine, they are required to show only a reasonable capacity for the position, scrupulous good faith, and the exercise of their best judgment. These principles are recognized in our decisions: *Shea v. Knoxville & Kentucky Railroad Co.*, 6 Bax., 277, 283; *Shea v. Mabry*, 1 Lea, 319, 343. In this last case, it is conceded that Directors who act in good faith, and with reasonable care and diligence, but nevertheless fall into a mistake, either as to law or fact, are not liable for the consequences of such mistake. To the same effect are the authorities elsewhere: *Turquand v. Marshall*, L. R., 4 Ch. App. 386; *Godbold v. Branch Bank*, 11 Ala., 191; *Spering's Appeal*, 71 Penn. Stat., 11; *Scott v. Depeyster*, 1 Edw. Ch., 513; *Hodges v. New England Screw Co.*, 1 R. I., 312; S. C., 3 R. I., 9.

The act complained of in this case was the failure to take from the Secretary a new bond upon his re-election in 1872, and again in 1878, upon the supposition that the bond given in 1871 did not bind the sureties beyond the re-election at the end of the first twelve months. It has been held that the failure to require the Secretary of a corporation to give a bond would make the President, whose duty it was to take the bond, liable for the defalcations of the Secretary: *Pontchartrain Railroad Co. v. Paulding*, 11 La. Rep., 41. If this

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be conceded to be good law, as perhaps it may, it would not necessarily fix liability on the defendants in the present case, for the by-law only requires the Secretary to give a bond for the faithful discharge of his duties, and such a bond was taken. The neglect of duty was in not requiring a new bond on each re-election of the same person. If the by-law had plainly required a new bond each year, or if—the language of the by-law admitting of the doubt—the directors had come to the conclusion that a new bond should be taken, the authority would have been in point. So, too, if the Directors had known that, as matter of law, the sureties would not be bound beyond the year, and yet neglected to require a new bond. The by-law does not, however, plainly require a new bond each year, and the agreed statement of facts concedes that the defendants “considered and discussed” the question of the bond, and reached the conclusion that the bond taken “covered his acts for the whole term he should serve the company.”

It was, at most, a mistake of law, or error of judgment, for which, without more, they would not be liable.

There is, of course, no pretense for charging the defendants upon the ground of a want of knowledge necessary to discharge their functions so great that they were not justified in assuming the office, for it is conceded that they were “good and efficient business men, several of them the

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heads of large mercantile and manufacturing establishments." Nor can they be charged with neglect of duty, it being agreed that they gave to the business of the company and the matter of the Secretary's bond "that care and attention which prudent men give their own affairs." It is not pretended that there was any bad faith.

There is, therefore, clearly no ground for holding the defendants liable, unless it be for failing to take legal advice. But the very fact that a mistake of law will not, of itself, create liability, necessarily implies that such a mistake may be committed without legal advice. Some of the cases do hold that acting under legal advice may tend to protect against liability, while none of them decide that its absence ensures liability. Ordinarily, the advice of counsel will not protect a trustee: *Perry on Trusts*, sec. 927. Nor shield any person from the consequences of a wrongful or illegal act: *Kendrick v. Cypert*, 10 Hum., 291. The true rule in this class of cases is, that if the Directors feel any doubts as to the law, they may be guilty of neglect if they fail to seek and be guided by competent legal advice, and *this* for the obvious reason that they would, under like circumstances, seek such advice in the management of their private affairs.

Affirm the Chancellor's decree, with costs.

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4L 309
9L 288
10L 563
12L 563
12L 618

MARTHA M. PARKER, by next friend, v. O. B.
PARKER, et al.

SEPARATE ESTATE. *Feme Covert.* Power to convey. The separate estate of a married woman, where the deed or conveyance under which she holds is silent as to the power of disposition, only differs from her general estate in the fact that the husband's marital rights are excluded and such separate estate may be conveyed by the joint deed of husband and wife, executed as required by law; but it is otherwise where the power of disposition is withheld or confined to some particular mode.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

W. M. SMITH, for Complainant.

CLAPP & MEUX for Defendants.

McFARLAND, J., delivered the opinion of the Court.

On the 15th day of February, 1853, James D. Goff conveyed the real estate in controversy to the complainant, then and now the wife of O. B. Parker. It is an ordinary deed in fee simple to the complainant and her heirs, adding, however, these words: "To the said Martha Macon Parker and her heirs and assigns forever, free from the use and control of her husband."

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The proof shows with reasonable certainty that the consideration was paid by O. B. Parker.

In January, 1859, the complainant executed a deed purporting to convey the property to her husband, which deed was acknowledged in due form and registered.

It appears that this latter conveyance was in consideration of other property, which the husband had purchased from one Ragland, deceased, which Ragland, by the husband's direction, conveyed to the complainant in exchange for the first named property; but the deed of Ragland to the complainant was not to her sole and separate use, but simply conveyed the property to complainant, without more.

Soon after the conveyance by the complainant to her husband, the latter conveyed the property embraced in the first deed (the property in controversy) to Williams, a brother of complainant, and he, in turn, conveyed it to Mrs. M. H. Mobley.

On the 22nd of May, 1866, the complainant and her said husband joined in a quit claim deed confirming the previous deed of complainant to her husband, which, they had been advised, was probably void, and ratifying and confirming the title to said Williams. This latter deed was properly acknowledged and registered.

Subsequently, Mrs. Mobley conveyed separate parts of the property to the defendant, and under these latter conveyances they claim they paid full

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considerations, have made improvements, and been in possession several years.

The complainant files this bill to recover the property upon the ground that under the deed of Goff she held it as "a separate estate," and consequently had no power to convey, and therefore, not only her deed to her husband, but also the joint deed of herself and husband to Williams, are void, and they, as well as the subsequent deeds, constitute clouds upon her title.

The defendants insist that if complainant's deeds be held void, still she should be estopped in equity from setting up her title, by reason of the fact that she joined in the sales and execution of the deeds, and also because she stood by and saw the defendants expend their money for the purchase and improvement of the property, without objection.

They further insist that she should, in any event, be required to surrender the property she received in exchange from her husband, that is to say, the property conveyed to her by Ragland; that she ought not to be permitted to repudiate her own conveyance and retain the consideration received.

This latter position is no doubt correct, but it appears that the complainant subsequently joined her husband in a conveyance of the Ragland property, her husband receiving and using the consideration for which it was sold. So that the complainant has nothing which she can restore. Having received this conveyance from her husband, or his vendor, and having afterwards joined her

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husband in a sale, for a consideration paid to him, she has restored to him all she received. Nor do I see how the complainant can be held estopped to assert whatever title she may have. If her deeds are void and inoperative to convey her title, I do not see how they can be made effective by way of estoppel to accomplish the same purpose. Aside from executing the deeds, she did nothing except remain inactive. She took no steps to assert her claim, although she was cognizant of the facts.

I agree that fraud is not one of the privileges of coverture, but the fraud in this case consists simply in repudiating deeds, which it is claimed are void, and doing so within the time allowed by law. While it does appear in many cases to have the element of bad faith, it is not regarded as such fraud in law as to repel a married woman from court. So that if the complainant is correct in the assumption that she had no power to convey the property in question, her right to recover it must necessarily follow. If the case of *Gray v. Robb*, 4 Heis., 74, be adhered to, then complainant is right in her assumption that she had no power to convey. For that case does hold that the separate estate of a married woman cannot be conveyed unless the power be expressly given. I am of opinion that the case was erroneously decided, and that the previous case of *Young v. Young*, 7 Cold., 461, lays down the law correctly; that is to say, that the separate estate of a mar-

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ried woman, where the deed or conveyance under which she holds is silent as to the power of disposition, only differs from her estate held in the ordinary way, in the fact that the husband's marital rights are excluded, and in such case the property may be conveyed by the joint deed of the husband and wife, executed in the usual way, but it is of course different where the power of disposition is in terms withheld, or the power of disposition confined to some particular mode, for it is perfectly competent for the grantor of the estate to impose any lawful limitations or trusts he may see proper.

The case of *Young v. Young* was decided upon an elaborate review of the previous decisions in this State, and the conclusion, to my mind, is satisfactory. The case of *Gray v. Robb* disposes of the question by assuming that it was settled by the previous cases referred to, not referring, however, to the case of *Young v. Young*, which had probably not then been published or called to the attention of the Court.

The Act of 1869-70, passed in reality previous to the decision of *Gray v. Robb*, gives the power of sale where it is not expressly withheld in the instrument creating the separate estate: *Molloy v. Clapp*, 2 Lea, 586. Thus in effect providing a statutory rule at variance with the doctrine of *Gray v. Robb*, in substance the rule in *Young v. Young*. The deeds in this case were, however, made previous to the statutory change.

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Under these circumstances, I do not see that any inconvenience can arise from overruling the case of *Gray v. Robb*, as it is not now a rule of property; in fact, never became a permanent rule of property to which the principle of *stare decisis* ought to apply, for the law was changed by statute before *Gray v. Robb* was decided.

I am of opinion, therefore, that the case ought to be overruled and the complainant's bill dismissed, as its only equity is the supposed want of power to convey. The complainant's deed to her husband may be regarded as void, but I think the subsequent deed of herself and husband to Williams ought to be held valid.

The Court concurring in the conclusions, the decree of the Chancellor will be reversed, and the bill dismissed with costs.

Miller v. O'Bannon.

41. 898
71. 696

MILLER, STEWART & Co. v. E. O'BANNON *et al.*

1. **ASSIGNMENT.** *Rights of assignee and judgment creditor claiming under levy of execution.* As between the assignee under a general assignment for equal benefit of all the creditors, and judgment creditors of the assignor, claiming under an execution levy, it is a race of diligence, and the judgment creditor will not be deprived of the fruits of his diligence merely on the ground that the levies were made "just before or while said assignment was being written."
2. **EXECUTION.** *Issued upon insufficient affidavit not void.* An execution issued prematurely by a Justice of the Peace without a sufficient affidavit is not void, but valid until set aside, and no one can take advantage of the irregularity except the defendant, nor even he collaterally.
3. **SAME.** *Garnishment. Answer of garnishee waives notice.* The appearance and answer of the garnishee waives the objection to the notice, which although authorized by the officer having in his hands the execution, and signed in his name, was neither written, nor served by him, nor do these facts give the assignee of the judgment debtor any ground in equity to follow the fund in the creditor's hands.
4. **ASSIGNMENT.** *Registration notice to debtors.* The registration of a trust assignment does not perfect the title of the assignee to the assignors choses in action as against creditors, but there must be notice to the debtors before garnishment.
5. **EXECUTION.** *Levy.* A levy on bulky articles in a closed cellar through a crack in the door will be good if the articles be kept in view by the officer until surrendered by the debtor

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

Miller v. O'Bannon.

CLAPP & BEARD and H. E. JACKSON for Complainants.

HARRIS & TURLEY and J. O. PIERCE for Defendants.

COOPER, J., delivered the opinion of the Court.

O'Bannon & Morris, leasees and proprietors of the Peabody Hotel, in the city of Memphis, on the 3rd of March, 1876, made an assignment to the defendant, E. P. Phillips, in trust for the benefit *pro rata* of all their creditors, of their "rights, interest, property and effects" in said hotel, including "notes, books, accounts, and choses in action." This assignment was noted for registration at five minutes before eleven o'clock of the forenoon of that day. The contest is between the assignee and two of the creditors of the assignors, who claim to have acquired, by virtue of the levy of executions, a prior and superior title to some of the effects assigned. The Chancellor decided in favor of the trustee, and the creditors appealed.

Phillips filed his cross bill against all the creditors of O'Bannon & Morris, with a view to have the amounts of their respective claims ascertained, and the trust administered by the Court. He further sought to compel the appellants, Oliver, Finnie & Co. and Victor D. Fuche, two of those creditors, to account for moneys received by them by the sale of some of the property intended to

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be included in the deed, by virtue of execution levies made on the same day.

The charge of the bill is that these creditors, just before and while said assignment was being written, sued out some kind of legal process from certain Magistrates' Courts for the purpose of obtaining a preference over the other creditors, and collecting their debts in full, and had said process levied on a large amount of the property of O'Bannon & Morris, which was intended by them to be conveyed by said assignment in trust for the benefit of all their creditors in common.

The appellants answered, insisting that they had sued out legal process, and had, by the levy thereof, acquired a lien on the property and effects mentioned, before the registration of the assignment.

The proof in relation to Oliver, Finnie & Co.'s demand is, that, by service of a warrant issued by a Justice, O'Bannon & Morris were summoned to appear at 9 o'clock of the morning of the 3rd of March, 1876; that, failing to appear, a judgment was promptly taken at the hour designated; that, at 10 o'clock of the same morning, one of the plaintiffs made oath that unless an execution was issued at once they "were in danger of losing their debt;" that an execution was, thereupon, issued and levied upon the property in controversy before the assignment was noted for registration. The garnishment notices were also issued and executed before the assignment was noted, on which

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judgments were afterwards had against the garnishees.

The bill admits, and the proof shows, that the levies were made before the deed of assignment was noted for registration. There is nothing to show collusion between the creditors and debtors, nor anything impeaching the good faith of the former proceedings. In this view, if there was nothing else in the case, the facts would only show a race of diligence between the creditors, and the appellants would be entitled to the advantage secured.

It is argued, however, that the execution was void, because prematurely issued upon an insufficient affidavit, and that the proceedings under it were, consequently, void also.

By the common law, as soon as final judgment was signed execution might issue, unless there was a writ of error depending or an agreement to the contrary: Tidd's Pr., 994.

The Code prescribes the time within which it is made the duty of the proper officer to issue execution, without interfering with the common law rule: Code, sec. 3009, *et seq.* But, as under our practice, it is in the power of the Court, during the term, to set aside a judgment. the execution cannot properly issue until the expiration of the term without an order of Court: Code, sec. 3010. And as, also, time is given for the stay of a Justice's execution, the execution cannot issue with-

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in that time except by the act of the Justice, on good cause, shown by affidavit: Code, sec. 3011. After the adjournment of Court, the Clerk may issue execution at any time, and it is made his duty to issue it upon affidavit filed that the defendant is about fraudulently to dispose of, conceal or remove his property, to the endangering of the plaintiff's debt: Code, sec. 3009. The same affidavit is equally efficacious with a Justice of the Peace. Whether any other facts shown by affidavit would be good cause, it is unnecessary to enquire. The great weight of authority is that an execution prematurely issued is not void, but valid until set aside, and no one can take advantage of the irregularity, except the defendant himself, nor even he, collaterally: Freeman on Ex., sec. 25.

Our own decisions are in accord, and that, too, in the case of a Justice's execution: *Stanley v. Nelson*, 4 Hum., 484; *Carpenter v. Savings Bank*, 1 Lea, 202.

As between the judgment creditor and the assignee of the debtor's property, the only question is one of title.

The garnishment notices in this case were authorized by the Constable who held the execution, and were issued in his name, but neither signed nor served by him. It is argued that they were void. The provision of the Code is that the officer, in whose hands is an unsatisfied execution, may summon, in writing, any garnishee. Whether such a garnishment notice would stand the test of

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a contest by the garnishee, may admit of doubt: *Hogshead v. Carruth*, 5 Yer., 280.

It has been repeatedly held, however, that the appearance and answer of a garnishee waives any objection that might have been taken to the notice: *Moody v. Alter*, 12 Heis., 142; *Hearn v. Crutcher*, 4 Yer., 475.

It is further argued that even if the judgment of garnishment was good, the right of the creditor would, under the circumstances—the garnishees having no knowledge of the defect in the notice—date only from the rendition of the judgments against the garnishees, which was after the registration. Although the garnishees may be joined, the creditor, it is insisted, should be made to refund: *Haynes v. Gates*, 2 Head, 602.

The garnishment notices having been run before the deed of assignment was noted for registration, or, so far as appears, even executed, and in good faith, there is nothing affecting the conscience of the defendants upon which the court of equity can base any decree requiring them to pay over the money to the complainant.

It comes back to the race of diligence and the question of title.

The liability of the garnishees to the judgment debtor was a mere debt or chose in action. The registration of the trust assignment did not perfect the assignee's title to these choses in action. That could only be done by notice to the persons thus indebted: *Flickey v. Long*, 4 Bax., 169; *Dews v.*

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Olwill, 3 Bax., 432; *Lambreth v. Clarke*, 10 Heia., 32; *Clodfelter v. Cox*, 1 Sneed, 330; *Allen v. Bain*, 2 Head, 101. No such notice was given in this case prior to the judgments, nor, under the circumstances, ought the judgment creditors to be deprived of their legal rights, merely because they continued to prosecute them after notice of the assignment.

It is further objected that the evidence discloses the fact that the Justice probably deputed a person to execute the warrant, on which the judgment was rendered, without any effort on the part of the plaintiff to find a regular officer: Code, secs. 4148, 4148a. But the Magistrate's power to deputize being clear, his action cannot be collaterally impeached.

The officer who had in his hands the execution of V. D. Fuche seems to have made his levy, which was upon four casks of wine, by looking through an opening of the cellar door, which was fastened. But the bill admits the levy, and that it was prior to the assignment, and the complainant himself proves that the officer who, either in person or by agent, had kept guard over the cellar, was permitted by him to take the articles under the levy, upon giving up a levy which he had also made on the table linen and other articles. Strictly speaking, the bill makes no contest in regard to the levies of either of the appellants.

It goes upon the theory that the levies were

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void, by reason of the fact that the deed of assignment was being drawn up at the time, and that all the creditors were secured.

By asserting their legal rights acquired prior to the trust, the appellants neither impeached the trust, nor lost their rights under it: Hadley's case at Nashville, December Term, 1879.

The Chancellor's decree must be reversed, and a decree entered here in favor of the appellants, with costs.

HENRY C. HILL AND WIFE v. CARLOS CLARK et al.

1. *INFANT. May exercise power, when.* An infant may exercise a naked power, unaccompanied with any interest or not requiring exercise of any discretion.
2. *SAME. Power given to execute during infancy.* If a power is given to an infant, relating to his own estate, it must be inserted in the deed that he may execute it during his infancy, or his execution of it will have no effect.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

Hill v. Clark.

McKISSICK & TURLEY and TAYLOR & CARROLL for
Complainants.

HENRY CRAFT for Defendants.

DEADERICK, C. J., delivered the opinion of the
Court.

On the 19th of October, 1872, complainants filed their bill in this case in the Chancery Court at Memphis. It alleges that complainant, Laura Gertrude, is the daughter of J. R. Jones, born March 3rd, 1852, and that she and complainant, Henry C. Hill, were married in 1871; that on the 22nd of December, 1859, her father, by deed of that date, conveyed a house and lot in Memphis, described therein, to one John W. Hawthorne, in trust for her, and to her sole and separate use during her natural life, with reversion to grantor.

A copy of this deed is exhibited with her bill, was acknowledged for registration December 23rd, and registered December 30th, 1859.

The deed then provides: "If said, Laura shall, at any time, desire to have said lot of ground sold, and the proceeds thereof invested in other real estate, and negroes, she may in writing request the aforesaid trustee to make sale thereof, naming the price at which it shall be sold, and shall name or designate the property to be purchased in its stead, which request she shall sign and acknowledge before the Clerk of the County Court, in

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form and manner similar to the statutory requirements of married women acknowledging deeds of conveyances."

This being done, the deed authorizes the trustee to sell and invest, etc.

The bill further alleges that about the 28th of January, 1862, when the complainant, Laura, was less than ten years of age, she was taken by her father to a strange place, and in the presence of strange gentlemen a paper was read to her, the nature and purport of which she did not fully understand, but it impressed her "that she was to sign away her home," which she was averse to, but the gentlemen present and her father persuaded her to do.

This paper is also exhibited with the bill, and is a letter addressed by said Laura to Hawthorne, the trustee, requesting him to sell the house and lot for \$4,000 and invest the proceeds in certain lands in Arkansas.

This letter, entitled "letter of authority," was signed by said Laura, by making her mark, and the Clerk of the County Court, by his deputy, certifies, on the same day on which it is dated—January 28th, 1862—that he was personally acquainted with Laura Gertrude Jones, the maker, and that she acknowledged "that she executed the same for the purposes therein contained."

And, on the same day—January 28th, 1862,—the said Hawthorne conveyed, as trustee, the said house and lot to one Thomas Jones, for the considera-

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tion, as recited in the deed, of \$4,000; and it is alleged that said sum never was invested for complainant, Laura, in any manner, and that defendant, Clark, was in possession of the house and lot, and had been for several years, setting up claim thereto, claiming under a purchase from said Thomas Jones.

The bill further alleges that complainant, Laura, was a minor at the time of said several transactions and conveyances; repudiates them, and asks that they be declared void and cancelled, and be declared clouds upon her title, and that the possession and title to said house and lot be decreed to her, and that she have an account for rents, etc.

Clark demurred to the bill, and assigned several causes of demurrer, one of which was held good, but was remedied by amendment, and as to others the demurrer was overruled, and said Clark was required to answer.

The answer admits the conveyance by J. R. Jones to Hawthorne, trustee, and his conveyance to Thomas Jones, and admits that he holds and claims, by purchase from Thomas Jones, the said house, and sets up and relies upon the plea of innocent purchaser, without notice, and that J. R. Jones executed a deed for his reversionary interest, and said Thomas Jones conveyed the premises to him; denies any knowledge of the infancy of said Laura, at the time of his purchase and payment of \$3,600, which was the amount paid by him; and exhibits with his answer J. R. Jones' deed to Thomas Jones, and Thomas Jones' deed to him,

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both bearing date January 16th, 1866. The last named deed refers to the deed of said Hawthorne, as trustee of said Laura, to said Thomas Jones.

The facts stated in the bill and answer, it was agreed, should be considered as if they had been severally sworn to by the respective parties as depositions.

Upon the facts there is no conflict. The complainant was a little less than ten years of age when she gave what is called a "letter of authority," directing the trustee to sell. The defendant insists this was a valid exercise of the power to direct a sale, under the deed of J. R. Jones to Hawthorne, as trustee, and that he has, at all events, the legal title, by regular conveyances, and as an innocent purchaser without notice he cannot be divested of his title.

An infant may exercise a naked power, unaccompanied with any interest, or not requiring the exercise of any discretion. If a power is given to an infant, relating to his own estate, it must be inserted in the deed, that he may execute it during his infancy, or his execution of it will have no effect: Perry on Trusts, sec. 52, citing cases.

Defendant's solicitor has submitted a recent (1878) decision of an English Chancery Court, in 7 Eng. Law R., 728, in the matter of Cardross's settlement, in which it was held that an infant can exercise a power, even though it be coupled with an interest, where an intention appears that it should be exercised during minority. In contem-

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plation of marriage, certain sums in consols and three per cent. annuities were vested in trustees for Lady Cardross, "an infant of seventeen years and upwards," she being a ward of Court, with power to re-invest "with the consent" of Lady Cardross and her husband; and the trustees applied for advice whether she, being still a minor, could consent to a re-investment.

After stating that Lord Hardwicke had held in *Hearle v. Greenbank*, 3 Atk., 695, that an infant could not execute a power over real estate, the Master of the Rolls said that it appears from this judgment, as interpreted by Preston, that an infant might exercise such power, if the minority is expressly dispensed with, or if there is an indication of intention that the power might be exercised during minority. The Master of the Rolls then states that the property is not real estate, but pure personalty, and that the fact of her minority is stated in the settlement, in which she is required to give her consent, and from these facts, and others, he held, she might consent, it appearing that it was intended to confer the power.

Although such intention does not very clearly appear, yet the facts stated, as existing in that case, even if we considered them sufficient, do not exist in this.

In this case there is nothing in the language of the deed, or surrounding circumstances, to indicate that it was the intention of the donor that the consent of Laura might be given to a sale

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during her minority. The conveyance was made to a trustee for her, when she was about seven years of age, to be held by him for her during her natural life, to her sole and separate use, free from the control, or liability for debts of any husband she may thereafter have.

The deed further provides if said Laura should at any time desire to have said lot sold, then she may request the trustee, in writing, to sell, and fix the price and specify the property in which the proceeds shall be invested.

Manifestly, these provisions contemplated that Laura should exercise judgment and discretion, and should be of an age at which she might be presumed to have some capacity to determine whether it was judicious to sell, and to be able to form some idea of the value of the property to be sold, as well as to be able to determine in what property to invest, and at what price. It is a mere farce to have a child of scarcely ten years of age charged with the exercise of discretion in such matters. In such a case it would require very clear expression of intention to confer such powers before it could be sanctioned and approved.

These several conveyances, as well as the "letter of authority" bearing date January 28th, 1862, were all prepared by others, and the letter signed without any just comprehension on her part of their force and effect. There was no explanation to her of the nature and consequences of the act she was doing, which she could comprehend, and

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her execution or acknowledgment of the letter requesting the sale of the property was not in conformity to the requirements of the deed. Possibly if she had been privately talked to, and examined, she might have been saved from the signing of the letter.

At all events, we are of opinion that said conveyance by the trustee did not divest complainant of her title to the house and lot, and that under the said trust deed she had no power to assent to the sale of the property during her minority, and was, in fact, incapable of understanding the effect of her act, and that said Thomas Jones obtained no title to the same, and conveyed none to defendant which he can set up against complainants. And under the facts of this case, complainant had the undoubted right to repudiate the sale as being unauthorized by her, and make void the said conveyance of said trustee. And as the deed of said trustee, being thus avoided, does not, and it is held did not, divest the complainant of her title to said land, the plea of innocent purchaser cannot prevail against her.

The Chancellor held in conformity to the views expressed in this opinion, and his decree will be affirmed, with costs.

DEADERICK, C. J., upon petition to re-hear, said:

We are asked to modify the opinion pronounced in this case at a former day of this term.

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It is argued that the grantor of the power to the infant, who is also her father, must be presumed to know whether he intended it to be exercised during infancy of the donee, and that his urging her to execute the power shows that it was his intention that the power should or might be exercised during the infancy of the donee.

We do not think so. It is evidence that the father desired his daughter to execute the power at the time he prevailed upon her to do so, but it does not prove that such was the intention at the time of its creation. On the contrary, as stated or intimated in the former opinion, the instrument itself which created the power, manifests a different intention, in that the exercise of the power required judgment as to the value of property, discretion to determine if it were judicious to sell and re-invest, and in what other property. And it is very clear that an intelligent father could not have supposed that his infant daughter, less than ten years old, was capable of determining these questions.

The opinion heretofore announced will be adhered to in the particular above indicated.

But the decree may provide that Clark may be vested with any title to the Arkansas land which may have been vested in complainant, in payment of her Memphis property, if any such title had been vested in her.

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4L 414
12L 734
15L 194
3pi 32

ISAAC B. KIRTLAND v. MISSISSIPPI & TENNESSEE RAIL-
ROAD COMPANY.

CHANCERY PLEADINGS AND PRACTICE. *Cross-Bill after decree in Supreme Court. Endorser's payment.* The payment by accommodation endorsers of a judgment at law against them in depreciated bank notes furnished by their principal, will be a satisfaction of a subsequent decree in equity against the principal for the same debt, and, where the suit in equity was pending in the Supreme Court at the time of the payment, the defense may be made by cross bill filed before or after the final decree of the Supreme Court.

FROM SHELBY.

Appeal from the Chancery Court at Memphis,
R. J. MORGAN, Ch.

W. M. RANDOLPH for Complainant.

C. F. VANCE for Defendants.

COOPER, J., delivered the opinion of the Court.

On the 31st of October, 1860, F. H. Cossitt sold and conveyed to the Mississippi & Tennessee Railroad Company a tract of land, reserving on the face of the deed a lien for the payment of the purchase money, evidenced by two notes—one for \$5,717.37 and the other for \$6,041. The first

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of these notes was transferred by Cossitt to the Bank of West Tennessee. This note was renewed several times upon the payment of the interest, the last renewal bearing date May 6th, 1862, at four months, with F. M. White and C. F. Vance as accommodation endorsers. The bank transferred this note to the complainant, Isaac B. Kirtland. He brought suit at law against the railroad company and the endorsers, and, afterwards, on the 17th of April, 1866, filed the original bill in this cause against the same parties, to enforce the lien reserved on the face of the deed for the payment of the purchase money. The plaintiff afterwards dismissed his suit at law as to the railroad company, and his suit in equity as to the endorsers, White and Vance.

On the 23rd of April, 1868, Kirtland recovered judgment at law against the endorsers for the full amount then due upon the note.

On the 10th of March, 1868, a decree was rendered in this suit in favor of Kirtland against the railroad company for the amount due upon the note, but the Chancellor held that the recovery was no lien on the land, and that it might be paid in the notes of the Bank of West Tennessee. The complainant appealed to this Court, and the latter part of the decree was reversed, and a decree rendered declaring that the recovery was a lien upon the land, and was not required to be paid in the notes of the Bank of West Tennessee. The land was ordered to be sold in satisfac-

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tion of the decree, if the amount was not paid by the company within a given time. Afterwards, at the same term, upon an affidavit of the defendants' counsel that the judgment at law had been paid, under an order of that Court, in the notes of the Bank of West Tennessee, the Court ordered the cause to be remanded to the Chancery Court for the execution of the decree.

During the same term at which the judgment at law had been rendered in favor of Kirtland against White and Vance, on the 20th of May, 1868, the defendants came into court, tendered and paid into court the amount of the judgment, with the interest which had accrued thereon, in the bills of the Bank of West Tennessee, and moved the Court for a rule upon the plaintiff requiring him to accept the same in satisfaction of the judgment. The rule was granted, upon consideration whereof, after argument on both sides, the plaintiff was ordered to accept the sum so tendered in full satisfaction of the judgment, and the Clerk was directed forthwith to pay the same to the plaintiff, taking his receipt therefor.

The Clerk paid the money to the plaintiff, and entered satisfaction of the judgment, on the same day, May 20th, 1868.

The plaintiff excepted to the orders of the Court, but took no appeal.

The notes of the Bank of West Tennessee were then worth in the market about thirty cents in the dollar.

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After this cause was remanded to the Chancery Court, on the 12th of February, 1875, the parties entered into an agreed statement embodying the foregoing facts.

The plaintiff, while agreeing to the facts, added: "But the plaintiff insists that the Court cannot take cognizance of them, and objects to their being considered or taken notice of in any form or for any purpose whatever." He further insists that he was entitled to the immediate execution of the decree of the Court under the *procedendo* awarded as aforesaid.

On the 5th of March, 1875, the cause was heard upon the motion of the plaintiff to have the decree executed, and upon the agreed statement of facts, upon consideration whereof, the Chancellor was of opinion that the decree had been fully paid and satisfied. The motion was disallowed with costs, and the plaintiff appealed.

The judgment recovered by the plaintiff at law, on the note in controversy, against the accommodation endorsers, was obtained after the rendition of the decree in equity against the railroad company, and the subsequent proceeding of the 20th of May, 1868, touching the tender and payment of the notes of the Bank of West Tennessee, were had while the equity cause was in this Court by appeal. The object of applying for a remand of the cause to the Chancery Court after the rendi-

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tion of the decree in this court was, doubtless, to test the question whether the payment by the endorsers and acceptance by the plaintiffs of the notes of the Bank of West Tennessee, was a satisfaction of the plaintiff's entire demand. No doubt the question might have been tested immediately after the notes were paid out to the plaintiff, by a cross-bill in this cause, bringing the new facts before the court, and enjoining further proceedings under the appeal to this court until the rights of the parties could be determined upon the new matter: *Morrison v. Searight*, 4 Bax., 479. But it is equally clear that this new matter, which could not be used directly in the Supreme Court, which had occurred after the appeal, and which, if a defense at all, was a defense to the enforcement of the judgment or decree of the Supreme Court, might be brought forward by an original bill in the nature of a cross-bill, or, by leave of the Court, by cross-bill proper: *Roberts v. Peavy*, 9 Foster, 372; *Montgomery v. Olwill*, 1 Tenn. Ch., 169. This is the settled rule in the case of the defense of a discharge in bankruptcy pending an appeal in this court: *Dick v. Powell*, 2 Swan, 632; *Anderson v. Reaves*, 1 Tenn. Leg. Rep., 129; *Eberhardt v. Wood*, 2 Tenn. Ch., 490; *Wolf v. Stix*, 96 U. S., 543. In such a case, where the party is only resisting a demand which he has been constantly opposing, the remedy is open whenever the demand is sought to be enforced: *Lewis v. Brooks*, 3 Yer., 167.

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The voluntary act of the plaintiff in joining the defendant in making an agreed statement of facts for the consideration of the Court, upon the point of controversy between them, cannot be considered otherwise than as a waiver of formal pleadings, and a consent to have the matter determined upon its merits.

The formal protest of the plaintiff, embodied in the statement, cannot mean that the rights of the parties in the matter shall not be determined at all, for that would be inconsistent with the act of joining in the agreed statement. What the plaintiff intended thereby was to claim that, no matter whether the proceedings were formal or informal, his rights acquired by the decree could not be prejudiced by the facts agreed to. In other words, what is said is equivalent to a demurrer to a bill, or cross-bill, by defendant, setting out the facts as embodied in the agreed statement, and praying that the decree be declared satisfied. Undoubtedly, the plaintiff is entitled to have his rights declared as upon such a formal bill and demurrer thereto. He is not to be prejudiced by the form in which the matter of controversy is presented.

In this view, the question is whether, upon a formal bill, the defendant is entitled to have the decree in this cause declared satisfied because of the satisfaction of the judgment at law against its accommodation endorsers, by the payment to the plaintiff of the notes of the Bank of West Tennessee. If the judgment had been paid in full

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by money at par, it is clear the debt would be extinguished. For, however many parties the creditor may have bound for his debt, and however many separate judgments he may recover against them, he is only entitled to one satisfaction.

It has been expressly held by this Court, that the payment by the endorser of a note or a judgment against him on the endorsement, will, by operation of law, satisfy a judgment of the same creditor against the maker of the note: *Topp v. Branch Bank of Alabama*, 2 Swan, 184.

It has also been held that the collection of one of several judgments against *tort feasors* for the same wrong will satisfy the other judgments: *Knott v. Cunningham*, 2 Sneed, 204.

No doubt an endorser is, ordinarily, entitled to the evidence of the debt which he pays, and, if that be merged in a judgment, to the judgment: *Eno v. Crooke*, 10 N. Y., 66. And the error in the case of *Topp v. Branch Bank of Alabama*, if there be error, was in overlooking the endorser's right of subrogation by operation of law, and considering it as resting solely on the subsequent formal assignment of the judgment treated as satisfied by the endorser's payment.

In this case no such question arises; for the agreed statement of facts shows that the notes of the Bank of West Tennessee, which were used by the endorsers in paying the judgment against them,

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were furnished by the present defendant. If, therefore, the satisfaction of that judgment satisfied also the decree in this case, the satisfaction was with the money of the defendant, and the endorsers have no claim of subrogation.

The judgment creditor, all the authorities agree, may accept payment in any manner, or in any kind of currency, and having once accepted currency, note, check or any other article of value as a substitute for a legal tender, cannot revoke his acceptance and enforce payment in money: Freeman on Judg., sec. 463. A payment in Confederate notes is good, if received: *Cross v. Sells*, 1 Heis., 83. So is a payment in genuine bank notes, although the bank had, in fact, previously failed, of which the parties were ignorant: *Scruggs v. Gan*, 8 Yer., 175; *Ware v. Street*, 2 Head, 612. A payment in depreciated bank paper, if taken as money, absolutely, without condition, and with a full knowledge of the facts, is undoubtedly good. Such paper would be money as defined by this Court, although under par, and, if voluntarily received in satisfaction, would extinguish the debt: *Crutchfield v. Robbins*, 5 Hum., 15; *Burford v. Memphis Bulletin Company*, 9 Heis., 694.

This conclusion does not depend upon the *res adjudicata* of the proceedings at law upon the tender of the bank notes.

If those proceedings were valid, they were, of course, conclusive, never having been reversed. If void, their invalidity made the receipt of the

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money in satisfaction the voluntary act of the creditor. In either view, the payment extinguished the debt, and all judgments or decrees based thereon.

The decree of the Chancellor must be affirmed, with costs.

WM. P. FOWLKES v. L. POPPENHEIMER & Co.

EXECUTION. *Must follow the judgment.* An execution issued by a Justice of the Peace bearing a different rate of interest from the judgment upon which it is issued, will be quashed upon being brought into the Circuit Court by writs of *certiorari* and *supersedeas*.

FROM DYER.

Appeal in error from the Circuit Court of Dyer County. S. W. COCHRAN, Sp. J.

LATTA & MARSHALL for Fowlkes.

T. M. ANDREWS for Poppenheimer.

Fowlkes v. Poppenheimer.

McFARLAND, J., delivered the opinion of the Court.

The plaintiff in error presented to a Circuit Judge his petition for writs of *certiorari* and *supersedeas*, alleging that he became stayor of an execution for W. M. Watkins on a judgment rendered by a Justice of the Peace against said Watkins in favor of L. Poppenheimer. That upon expiration of the stay execution had been issued and levied upon petitioner's property, the execution calling upon its face for the collection of ten per cent. interest from the date of the judgment, while the judgment only bore six per cent. interest. It is charged, further, that a large part of the judgment had been paid by the principal, Watkins, before the execution issued, but the credits had not been entered.

The writs were granted, and upon return the petitioner moved in the Circuit Court to quash the execution for the reasons stated, but the motion was overruled.

The defendant moved to dismiss the petition, which was also overruled.

The cause was submitted to a jury sworn to try the matters in dispute, who returned a verdict for the amount of the original judgment, less a payment of \$44.60, admitted, and for the amount so returned, and all costs, the Court gave judgment against petitioner and his surety on his *certiorari* bond, from which he appealed.

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We think the execution, which appears upon its face to call for ten per cent. interest from the date of the judgment, while the judgment only bears six per cent. interest, should have been quashed, and execution issued from the Circuit Court for the proper amount, and the costs adjudged against Poppenheimer & Co. The petition was properly filed for this purpose, and should have been sustained.

As to the payment, the petition was perhaps not sufficient in not specifying the amount complained of.

It was no case to submit to a jury, unless it was to find the amount of the payment. The judgment of the Justice was not complained of, and the cause was not brought for a re-trial, but only for the purpose of quashing the execution. The only material error, however, in the result, is the judgment for the costs below.

The proper judgment may be entered here, quashing the execution of the Justice and awarding execution for the proper amount, which was correctly found by the jury, and adjudging the costs of this and the Court below against Poppenheimer & Co.

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JAMES ROBERTSON v. THE STATE.

1. **CRIMINAL LAW. Jury. Officer. Record.** The failure of the minutes of the Circuit Court to show that the jury returned into Court *in charge of their officer* is not reversible error.
2. **SAME. Same. Challenge.** A person peremptorily challenged on a former trial is competent to be placed on a succeeding panel of jurors.
3. **SAME. Same. Judges of the Law.** It is not error to charge the jury that they cannot arbitrarily disregard the law as charged by the Court.
4. **SAME. Opinion of Supreme Court** The opinion of the Supreme Court on a former hearing on the facts of the case is not evidence on a subsequent trial.
5. **SAME. Reasonable doubt.** A verdict of guilt negatives presumption of innocence, and the Supreme Court will not reverse on facts unless the evidence preponderates against the verdict.

FROM DYER.

Appeal in error from the Circuit Court of Dyer County. J. T. CARTEL, J.

T. E. RICHARDSON for Robertson.

Attorney-General LEA for The State.

McFARLAND, J., delivered the opinion of the Court.

Conviction for voluntary manslaughter.

1st. The jury were placed in charge of an

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officer properly sworn, but the record of the next day does not show that the jury returned in charge of the officer.

There is no error in this. It is not necessary that the record should affirmatively show that the officer did his duty. In the absence of anything to the contrary, this will be presumed.

2nd. A juror was presented who had been peremptorily challenged by the prisoner at a former trial

This was cause for challenge. The juror being otherwise competent, the fact that he had been on a former panel did not disqualify him. The challenge at the former trial by the prisoner only meant that at that time he preferred other jurors upon the panel. He having been presented the last time with a full panel of competent jurors, and allowed his full number of challenges, has no ground to complain

There was no error in the charge of the Judge telling the jury that they could not arbitrarily disregard his instructions as to the law. This Court has gone much further in this respect than the Circuit Judge meant in his charge. See case of *McLean v. State*. Nor was there any error in his telling the jury that the opinion of this Court upon a former hearing was not evidence as to the facts.

The only question in the case is whether the verdict is sustained.

∴ The question in the case was whether the kill-

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ing was purposely done or resulted from the accidental firing of a pistol while the parties were engaged in a playful rencounter.

The cause has been tried four several times, each time resulting in a verdict against the defendant. It was here at the last term, and was reversed for error in the charge, the opinion delivered by Judge Cooper expressing strong doubts of the defendant's guilt. Notwithstanding this, however, he has been again convicted, under a very fair and impartial charge, and the Circuit Judge has refused to disturb the verdict.

The only additional testimony heard on the last trial was to show that the defendant and deceased had had a difficulty shortly before the killing, which, though not of a very serious character, did tend somewhat to strengthen the case against the defendant.

My conclusion upon the testimony is that it does not preponderate against the verdict, and while there may be doubt as to the defendant's guilt, it is settled that the Court does not reverse upon a mere doubt, although a jury might have entertained a doubt, their verdict having negatived the doubt.

The judgment should be affirmed.

Smith v. State.

BAKER SMITH v. THE STATE.

CRIMINAL LAW. *Witnesses under the rule.* In a criminal case involving the life of the prisoner, a witness, whose testimony has only been discovered a few moments before he is put on the stand, ought not to be excluded merely upon the ground that the defendant had joined the State in requiring that the witnesses be put under rule, where the testimony of the witness is material to the defense.

FROM FAYETTE.

Appeal in error from the Circuit Court of Fayette County. T. J. FLIPPIN, J.

GEORGE HARDIN for Smith.

A. W. CAMPBELL for the State.

COOPER, J., delivered the opinion of the Court.

The plaintiff in error was indicted for poisoning her husband, convicted of murder in the first degree, and sentenced to death. She appealed in error.

The case is one of circumstantial evidence, and, there being evidence tending to show that the prisoner bought strychnia on the previous day to that of her husband's death, and that the husband exhibited some of the symptoms usually accom-

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panying death by that poison, the defense undertook to prove that the health of the husband was impaired, and that he was in the habit of having fits or spasms similar to those preceding his demise. Testimony was accordingly introduced by the defense tending to show that the deceased, in 1870, had a severe attack of disease which nearly proved fatal, that he then thought he was poisoned, and afterwards complained that he had never recovered from the effects, and that he was frequently afflicted with sudden sickness, accompanied with violent spasms.

The State had proved by the mother of the deceased that he was sound and healthy, and that she never knew of his having spasms.

Under these circumstances, the defendant offered to introduce a witness and prove by him that the deceased was an unsound man, his general health bad, and that he had had several attacks of severe sickness, accompanied with spasms; that he considered himself poisoned in 1870, and had never recovered from the effects thereof; and that his mother knew of this.

The State's Attorney objected that the witness had not been put under the rule.

Defendant's counsel stated that he and his client were not aware they could prove these facts by the witness until just before he was put on the stand, and for this reason the witness had not been subpoenaed, put under the rule, or kept out of the court-house

Smith v. State.

The trial Judge sustained the objection of the State's Attorney, and refused to allow the witness to testify, "for the reason that at the beginning of the case the rule was asked for by the State and defendant, and the witness stated he had heard the testimony of the defendant's witnesses."

. If, as the record fairly implies, his Honor was of opinion that the witness should be excluded merely because the State and the defendant had asked for the rule that the witnesses should be examined out of the hearing of each other, he was clearly in error. The rule is to be favored as a mode of eliciting the truth, and is demandable as of right in all cases, upon affidavit of facts showing its necessity; *Rainwater v. Elmore*, 1 Heis., 368; *Nelson v. State*, 2 Swan, 237. But all the authorities agree that the right of excluding the witness for disobedience to the order is in the discretion of the Court, a discretion rarely exercised: 1 Greenl. Ev., sec. 432, and cases cited. And it has been ruled that if the witness remain in Court, in disobedience of the order of separation, his testimony, on that ground alone, cannot be excluded, but is matter for observation on his evidence: *Chandler v. Horne*, 2 M. & Rob., 423.

If his Honor meant to exercise his discretion in excluding the evidence, although this Court would be slow to revise discretionary action of the trial Judge, yet the discretion was, under the circumstances of this case, improperly exercised.

The case was one of circumstantial evidence,

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involving human life, in which the links in the chain of proof were weakened by the failure of the druggist who sold the supposed strychnia to comply with the law, and the failure of the medical expert to test the existence of strychnine in the stomach of the deceased by any other than the color test, confessedly the most unreliable. The symptoms accompanying the attack and death of the deceased were not strictly such as usually attend that mode of poisoning, some of the most important being wanting, and the symptoms being such as occur in tetanus or fits. The very gist of the defense rested upon establishing the fact that the deceased had been subject to similar attacks, with the knowledge of his mother, with whom he had been living, and who might be supposed to know more than others his true condition. The witness offered had not been summoned, nor put under the rule, because his testimony was unknown. Of course the Court had the right to be satisfied in relation to these facts, and he seems to have interrogated the witness on the subject, who explained his presence in Court by the statement that he had been requested to bring the prisoner's little children to see her. The action of the Court was had upon the concession that the statement of the prisoner's counsel was correct.

The judgment will be reversed, and the cause remanded for a new trial.

Simpkinson v. McGee.

4L 436
7L 385
7L 737
9L 14

J. & A. SIMPKINSON & Co. v. J. P. MCGEE et al.

ASSIGNMENT. *Registered has priority over prior deed not registered.* A trust assignment of land for the benefit of creditors, duly registered, will have preference over a prior deed of the same land by one of the grantors, never registered, where the assignees had no notice of the previous deed, and accepted the trust before the filing of a bill to set up the unregistered instrument.

FROM GIBSON.

Appeal from the Chancery Court at Trenton.
JOHN SOMERS, Ch.

W. C. CALDWELL and COCHRAN & ENLOE for
Complainants.

W. M. NEILL, SP'L HILL and J. S. COOPER for
Defendants.

COOPER, J. delivered the opinion of the Court.

This bill, filed August 29th, 1872, raised a question of priority between a claimant under an unregistered deed of conveyance of land and the trustee and beneficiaries under an assignment, duly registered, of the same land, to secure pre-existing debts. The Chancellor rendered a decree in favor of the former and the latter appealed.

R. B. McGee and W. C. McGee were tenants

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in common in equal moieties of the land in controversy by deed in fee simple made on the 11th of November, 1865. On the 31st of July, 1871, W. C. McGee sold and conveyed the entire lot to J. P. McGee for \$1,500, secured by three notes in equal installments, at nine, twelve and eighteen months, a lien being retained on the land for their payment. The first two of these notes were assigned by W. C. McGee to the complainants, J. & A. Simpkinson & Co., in payment of a debt due to them by R. B. & W. C. McGee, as partners in the business of merchandising. On the 8th of August, 1871, R. B. and W. C. McGee conveyed the same land to L. P. McMurry in trust for Adderton & Howe and others, creditors of R. B. & W. C. McGee, as partners, to secure pre-existing debts due to them by the firm. These deeds were duly proved and registered at the time of their respective execution.

The bill is filed against J. P. & R. B. and W. C. McGee, L. P. McMurry and the beneficiaries in the trust assignment, to foreclose the vendor's lien retained for the payment of the notes held by complainants as above, and to set up, as against the trustee and beneficiaries, an alleged deed of conveyance of the land by R. B. McGee to J. P. McGee, made prior to the trust assignment, never registered, and alleged to have been lost. The McGees offered no resistance to the relief sought.

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The contest is over R. B. McGee's undivided moiety of the land.

The Code, sec. 2080, enumerates the instruments which may be registered, and includes in the enumeration all deeds for the absolute conveyance of land, and all mortgages and deeds of trusts of either real or personal property. By the Code, sec. 2074, it is provided: "Any of said instruments first registered or noted for registration shall have preference over one of earlier date, but noted for registration afterwards, unless it is proved in a court of equity, according to the rules of said court, that the party claiming under the subsequent instrument had full notice of the previous instrument." These provisions, as well as the next succeeding section of the Code are taken from the Act of 1831, chap. 90. And it has always been held that a mortgage or trust assignment for the benefit of pre-existing creditors falls within the provision, and, if first registered, will have preference over any of the enumerated instruments of earlier date not registered, unless the persons claiming under it had full notice of the unregistered instrument: *Myers v. Ross*, 3. Head, 60; *Knowles v. Masterson*, 3 Hum., 619. In the last of these cases, though the first in order of time, Judge Reese uses the word mortgage, although two of the instruments mentioned were trust assignments for creditors. "Mortgagees," he says, "are, in general, purchasers, and they are so within the words and meaning of the Act. The same prin-

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ciple governs their registration; the same consequence results from their non-registration; the same effect is to be given in a court of Chancery to the knowledge of their existence when unregistered. To hold the contrary would contradict not only the words of the statute, but disturb the unity, simplicity and harmony of the entire system intended to be corrected by the Registration Act of 1831."

In *Myers v. Ross*, the contest was between claimants under trust assignments, the first assignment in point of time, though the last registered, being apparently to secure a pre-existing debt, while the other, whose priority, by reason of registration, was postponed on account of notice, was intended to secure advances made at the time, as well as pre-existing debts. It was distinctly held that the provisions of the Act applied to deeds of trust.

In the case before us, it is neither alleged in the bill, nor is there any proof to show that the trustee or beneficiaries under the trust assignment had notice of the unregistered deed before they had accepted the benefits of the trust; and the bill was not filed until after the acceptance. If, therefore, the existence of the unregistered deed be conceded, the trustee and beneficiaries, without notice thereof, have, by the very terms of the statute, the better right to the disputed moiety of the land.

The Chancellor seems to have thought that the preference given by the Code to the instrument

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first registered, applied only when the claimants under it stood in the attitude of *bona fide* purchasers for value in the common law sense, as well as without notice, and that, as assignees under a voluntary assignment for creditors, are not such purchasers, according to the decisions, the preference could not be allowed them. The language of the next section of the Code to the one above cited, taken also from the Act of 1831, may have influenced the conclusion. That section is: "Any of said instruments not so proved or acknowledged and registered, or noted for registration, shall be null and void as to existing or subsequent creditors of, or *bona fide* purchasers from, the makers without notice." The previous section gives preference to instruments in the order of registration, subject only to the condition of the want of notice of the prior equity. This section declares the effect of an unregistered instrument as against creditors and *bona fide* purchasers of the grantor. The two provisions, constituting sections 6 and 12 of the original Act, are not in conflict, nor does either necessarily control the other.

Independent of statute, the general rule is that where the equities of conflicting parties are equal, whoever has the legal title shall keep it. The only doubt in the authorities was as to how far chancery would interfere to assert the prior equity against the legal title acquired under the junior equity with notice: 2 Lead. Ca. in Eq., notes to *Basset v. Nosworthy*. In all such cases, the assign-

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nees under a trust for pre-existing creditors were treated as volunteers: *Fawell v. Heelis*, Amb., 726; *Haggerty v. Palmer*, 6 Johns. Ch., 437.

It has always been so held in this State, when it could be done consistently with the positive provisions or the policy of the registration laws. It was so held in the case of a constructive trust, treated as a resulting trust, arising from the use by a guardian of a ward's funds in the purchase of lands: *Turner v. Petigrew*, 6 Hum., 438. So in the case of the equity of a vendee of land by parol to be repaid the purchase money or the value of improvements, upon rescission: *Rhea v. Allison*, 3 Head, 177. So in the case of a vendor's equity for unpaid purchase money after he has parted with the title: *Brown v. Vanlier* 7 Hum., 238. So in the case of a contract for a mortgage unregistered, if the Court intended to go to that extent, in *Cook v. Cook*, 3 Head, 719. The policy of the registration laws was allowed to overrule the doctrine of *Brown v. Vanlier*, even where the assignee, under the trust assignment, had full notice of the vendor's equity: *Fain v. Inman*, 6 Heis., 5; and *Cook v. Cook*, if intended to give a preference to an unregistered contract over a registered trust assignment for creditors, accepted by the assignee without notice of the trust, must be also overruled, because in conflict with the positive provision of the registration law. For all agreements for the conveyance of real estate are required to be registered by the Code, sec. 2030,

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and if a later trust assignment, first registered, will by the letter of the Act, have preference over an earlier unregistered mortgage, where there has been no notice, *a fortiori*, must it be preferred to a contract for a mortgage under the same circumstances. While it may be doubted whether the well recognized lien of a vendor should have been interfered with merely on the ground that it was opposed to the policy of the registration laws, because no provision is made for such a lien or equity any more than for the equity of a resulting trust, there can be no doubt that an unregistered conveyance or agreement to convey must yield to a registered trust assignment for creditors, without notice, because the case is directly within the letter and the intent of the statute. There are cases which seem to treat the beneficiaries in such an assignment as creditors within the Code, sec. 2075, against whom all unregistered instruments are void: *Green v. Demoss*, 10 Hum., 373; *Kinsey v. McDearman*, 5 Cold., 392; *Fain v. Inman*, 6. Heis., 14. Of course, a mere volunteer would stand in the shoes of his grantor, and notice to the latter would be notice to him.

A creditor who takes a conveyance to secure his debt is not such a volunteer, under the registration law as construed by this Court.

The decree of the Chancellor must be reversed, and a decree rendered here in accordance with this opinion.

Singer Machine Co. v. Cole.

SINGER MANUFACTURING CO. v. W. P. AND L. A. COLE.

41 439
91 396

CONTRACTS. *Sewing machine. Rent. Sale.* A contract to "rent" a machine at a fixed monthly rental, on payment of a certain number of which the renter becomes owner, is not a renting, but a sale, and is valid.

FROM GIBSON.

Appeal in error from the Humboldt Law Court.
G. B. BLACK, J.

McDEARMON & TYREE for Company.

H. T. JOHNSON for Cole.

FREEMAN J., delivered the opinion of the Court.

This suit is brought on the following contract:

"Rent note. No salesman allowed to make any contract other than is printed or written on this note. Fifteen months after date, for value received, I promise to pay to the order of the Singer Manufacturing Company ninety-five dollars, for the rent of their sewing machine, with interest at ten per cent. after maturity, and payable at Picketsville, Tennessee.

"It is agreed and understood between the

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makers, endorsers and payee of this note, that the Singer sewing machine number (giving it), for the use of which to the maturity of this note is given, is, and shall remain, the property of the Singer Manufacturing Company, and in default of payment, the said machine shall be returned to them or their agent in good order, and they or their agent are authorized to take possession of the same without process of law. On payment of this and all other notes, (given for the use of this machine) a bill of sale will be given, and title to same passed to the lessee; but until then, the title to the machine shall remain in the Singer Sewing Machine Company.

"L. A. SENTER.

"M. A. SENTER."

The facts shown in the record are that L. A. Senter, an unmarried lady, purchased or bargained for the machine, which was delivered to her at the time of the execution of this instrument. She has since intermarried with defendant, W. P. Cole.

The Circuit Judge charged the jury, following, we assume, a case from Minnesota, *Domestic Sewing Machine Company v. Anderson*, May No. L. R., 1877, that in case of a sale and delivery of personal property, an agreement by the purchaser to pay the vendor for the future use of the same, or to deliver it up to him on demand, is repugnant to the contract of sale, and is void. The receipt of the property by the purchaser furnishes

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no valid consideration for such an agreement. The idea that underlies his Honor's view of the case is, that there was first a purchase, and then a renting of the machine purchased, and such seems to be the view of the Minnesota Court.

This is not the fair construction of the contract, when we place ourselves in the situation of the parties, and take in all the circumstances of the case, as we may do to ascertain the meaning of the writing. It is true it is called a renting of the machine, but this is not the fact, nor true construction of the transaction. It was a sale of the machine, with a reservation of the title to the company, as security for payment of the price. The fact that it is called a renting does not make it so. In order to make it a renting of a purchased machine, we must say it was sold for nothing, and then rented to the purchaser by the vendor for fifteen months for ninety-five dollars, this being the only sum ever agreed to be paid. This would be absurd. However reprehensible and calculated to excite suspicion of unfairness this contract may appear, with its verbiage expressing literally a different meaning from what was intended, or was the truth of the case, we do not think proper to follow the technical view of the opinion referred to, and hold the contract void. The party has undertaken to pay ninety-five dollars, in terms for rent, but in fact for the purchase of the machine, and is bound, as far as we

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can see from this record, to meet the obligation contracted.

Without further discussion, let the judgment be reversed, and the case be remanded for a new trial.

4L 442
SL 508

THE STATE v. HENRY ROSS.

CRIMINAL LAW. *Plea of former conviction.* A plea of former conviction for the unlawful disturbance of a religious assembly "by loud noise, profane discourses, and indecent behavior," is no defense to an indictment for an assault with intent to commit murder in the second degree by shooting at a person named with a loaded pistol, although the loud noise of the previous indictment may have been the report of the pistol in the shooting of the last indictment.

FROM TIPTON.

Appeal in error from the Circuit Court of Tipton County. T. J. FLIPPIN, J.

Attorney-General LEA for The State.

SANFORD & CUMMINS for Ross.

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COOPER, J., delivered the opinion of the Court.

The defendant was indicted for an attempt to commit murder in the second degree, by shooting at a person named with a loaded pistol. The defendant pleaded that at a former day an indictment had been found against him, for that he did wilfully and unlawfully disturb an assembly of persons met for religious worship, by loud noise, profane discourses and indecent behavior, at a certain church designated; that he was regularly arraigned and tried, found guilty, and sentenced to punishment thereunder, the judgment remaining in full force; that the said unlawful disturbance was in fact perpetrated, as the evidence on the trial showed, by means of certain shots fired by him from a pistol; that the said shooting was the same shooting charged in the present indictment; all which he is ready to verify, wherefore, etc.

To this plea the State demurred.

The Circuit Judge overruled the demurrer, and, the Attorney-General declining to plead further, discharged the prisoner.

The State appealed.

"No person shall, for the same offense, be twice put in jeopardy of life or limb:" Const., Art. I., sec. 10.

"The general doctrine is plain," says Mr. Bishop, "and there are no conflicts of authority

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upon it, that, in the words of the Constitution itself, to entitle the prisoner to protection, the second jeopardy must be for the 'same offense' as the first. If, therefore, a man has been either convicted or acquitted of one crime, he may still be prosecuted for another:" 1 Bish. Crim. Law, sec. 1049.

But the Courts differ widely as to what will constitute the same offense. Some Courts have gone to the extent of holding that there can be only one punishment for one criminal transaction, while others, rushing to the other extreme, have held that one act may constitute any number of crimes, for each of which the doer may be prosecuted, and a conviction of one will not bar a prosecution for another.

Without undertaking the hopeless task of reconciling the authorities, or involving ourselves in the niceties of the subject, it is sufficient to say that this case presents no serious difficulty. It falls in a class of cases in which the offenses, according to Mr. Bishop, are not the same, namely, where each indictment sets out an offense differing in all its elements from that in the other, and, it may be added, where the one crime is not included in the other, and cannot be sustained by the same proof.

There is no connection between them, except that the noise of the shooting of a pistol is the same in both, for the former indictment, in no

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conceivable aspect, can be held even to embrace the transaction in the present indictment except in the averment that the disturbance in that case was "by loud noise," as well as "profane discourses and indecent behavior." That the two offenses are the same is a proposition utterly inadmissible upon any principle, and unsustained by any authority.

Reverse and remand.

41 445
104 114
104 637

MENKEN BROTHERS v. THOMAS J. TAYLOR et als.

1. **VENDOR'S LIEN.** *Notes for purchase money. Assignee.* Notes were executed for the purchase money of a tract of land, lien being retained. The vendor transferred one of the notes, guaranteeing that the note should be paid in preference to the others; *Held*, that the holder of the note was entitled to priority of payment, as against the vendor or his subsequent assignee.
2. **SAME. Same. Surety.** Where several notes have been executed for purchase money, one of which is secured by personal security, and the surety pays the note for which he is liable, he is not entitled to be reimbursed out of the proceeds of the land sold to pay balance of the purchase money until the same has been paid in full.

FROM TIPTON.

Appeal from the Chancery Court at Covington.

II. J. LIVINGSTON, Ch.

Menken v. Taylor.

THOMAS STEELE for Complainants.

BATE & SMITHEAL and E. J. & J. C. READ and
ZACH. TAYLOR for Defendants.

TURNER, J., delivered the opinion of the Court.

Ann E. Peete, the wife of John S. Peete, was the owner of a tract of land, with power of disposition, as if a *femme sole*. On the 12th of August, 1872, she sold, and herself and husband conveyed to Thomas J. Taylor for the price of \$4,275. For the first payment of \$1,000, on the 1st of January, 1873, Thomas J. Taylor executed his note, with his father, Thomas Taylor, as security. This note was paid mainly by the surety. For the remainder, Thomas J. executed his three notes to be paid in equal annual installments of \$1,091.13. A deed was made retaining a lien.

On the 13th of March, 1873, Peete and wife assigned the first of these notes to Menken Bros., in payment of a pre-existing debt of the husband. The note recites that it is given for land, etc. The assignment is as follows:

"For value received, we assign the within note to Menken Bros., and the said John S. Peete waives demand and notice, and guarantees the payment of the within note, and we both assign the lien on the land for which this note was given, and agree that this note, in case of a vendor's bill, shall be paid prior to any other note given for said land.

"March 13th, 1873.

"JOHN S. PEETE,
"ANN E. PEETE.

Menken v. Taylor.

At the time of this assignment, Peete and wife were the owners and holders of the other two notes, and continued so until the 1st of August, 1873, when "they traded" them to Orgill Bros., in payment of a pre-existing debt.

The questions are: 1st, Are the Menken Bros. entitled to priority of satisfaction?

2nd, Is the surety, Thomas Taylor, entitled to be repaid *pro rata* the sum paid by him, in the event the land does not sell for enough to pay the entire purchase money?

The general rule is that owners of purchase money notes, secured by a lien on land, are to be paid *pro rata*. The rule may be varied or changed by a stipulation to the contrary.

In this case the notes recite the consideration to be a tract of land. The deed mentions the several notes by dates of execution and maturity as well as amounts.

At the time of the assignment to Menken Bros., Peete and wife were the owners of all the notes and of the lien. They had the right* of disposing of all or either, upon such terms as suited them. If they desired to use one of the notes, and could and did do so by making a priority of lien a security for its payment, they, or those claiming under them, will not be heard to complain.

Orgill Bros. had their attention called to the existence of the deed, of the prior note, and of the lien retained for the payment of all the notes.

Crook v. Hudson.

They were bound to see they were getting the deferred notes, and were put upon inquiry as to the whereabouts and status of the first. They took such interest, and no more, as their vendors had, and are entitled to just such security as they had and no more.

The security, Taylor, is not entitled to be repaid out of the proceeds of the sale of the land until all the purchase money notes have been paid to the vendors or their assignees.

The decree is affirmed.

J. A. CROOK, Guardian, etc., v. J. C. HUDSON et al.

GUARDIAN AND WARD. *Sureties on bond. Priority.* The sureties on a renewed guardian bond are, under the statute, liable before the sureties on a previous bond, although the guardian appropriated the wards' funds to his own use prior to the execution of the last bond.

FROM MADISON.

Appeal from the Chancery Court at Jackson.
W. H. McCORRY, Ch.

Crook v. Hudson.

H. C. ANDERSON, CARUTHERS & MALLORY and
MUSE & BUFORD for Complainants.

J. L. H. TOMLIN, H. E. JACKSON and JOHN L.
BROWN for Defendants.

COOPER, J., delivered the opinion of the Court

At the September term, 1865, of the County Court of Madison county, J. C. Hudson was appointed guardian of J. A. and Robert Cooper, infants, and qualified by giving bond in the penalty of \$8000, with Peter McCallum and B. T. Hudson as his sureties. At the January term, 1873, of said Court, he renewed his bond in the sum of \$6,300, with T. C. Muse, Hiram Johnson, and A. S. Rogers as his sureties. When Hudson resigned or was removed from his guardianship does not appear, but at the November term, 1877, of the County Court, the complainant, J. A. Crook, was appointed and qualified as guardian of the children.

On the 28th of August, 1878, this bill was filed against J. C. Hudson and the sureties on both bonds then living, and the personal representatives of one of the sureties on the first bond, then recently deceased.

Upon final hearing, the Chancellor rendered decrees for the amounts found to be due to each of the complainant's wards, and declared, as between

Crook v. Hudson.

the sureties, that the sureties on the last bond were primarily liable.

The case is before us upon the appeal of these latter sureties from so much of the decree as adjudged that they were primarily liable.

The proof is clear that the money of the wards was used by the guardian for his own purposes before the execution of the bond of 1873. If the bond on which the appellants were held liable be considered as given under the Code, sec. 2499, which requires every guardian, at the time of exhibiting his biennial list or statement of his wards' estate, to renew his bond, then the Chancellor's decision was correct. For this Court has always held, as the true construction of the statute, that the liability of the obligors extended not only to the future action of the guardian, but relates back to his first appointment, and is co-extensive with the guardianship, the last sureties taken, under the statute, being first liable, and so of other sureties in that order: *Jamison v. Cosby*, 11 Hum., 278; *Tennessee Hospital v. Fuqua*, 1 Lea, 608. The same rule was applied to new sureties given by way of counter security: *Steele v. Reese*, 6 Yer., 263. And to new sureties given by way of substitution for old sureties released according to law: *Crawford v. Penn.*, 1 Swan, 388. The sureties in all these cases are estopped to deny that the guardian received the estate. It is only where the new surety is based upon an order of Court requiring other or better security that the

Crook v. Hudson.

rule as to the order of liability is different: *Mc-Glothlin v. Wyatt*, 1 Lea, 717. In which case the two sets of sureties are equally liable.

The charge of the bill in relation to the bond of 1873, is that Hudson "renewed his bond." The answer is that respondents "admit the execution of the bond of 1873," and elsewhere speak of it as the "renewed guardian bond."

The proof shows that the bond was given upon a statement of the wards' estate. It is, of course, not the less a renewed bond because it was not executed exactly at the end of two years, for that would be to stick to the letter, not the spirit of the law.

Neither in *Jamison v. Cosby*, nor *Tennessee Hospital v. Filqua*, were the renewals strictly biennial. Any renewal at any time pending the guardianship, not made in conformity with a different order of Court, would be a renewal bond within the meaning of the statute.

The decree must be affirmed, with costs.

Clark v. Carlton.

A. R. CLARK v. A. M. CARLTON.

1. **CHANCERY PLEADING AND PRACTICE.** *Bill to enforce vendor's lien. Collateral security. Parol evidence inadmissible, when.* Upon bill filed to enforce a vendor's lien, parol evidence is inadmissible to sustain the defense by answer that the vendor had received certain notes in payment of the installments of purchase money then due, the defendant's endorsements on the notes showing that they were assigned as collateral security.
2. **SAME.** *Attorney's fees. Reference.* Where a deed of conveyance, after describing the purchase notes sufficiently to identify them, retained a lien on the land for the "due payment of said notes," the lien will cover the reasonable fees of attorneys provided for on the face of the notes for their collection, although this feature of the notes be not mentioned in the deed. Evidence as to the amount of the fees having been introduced by the complainant in advance of the hearing on the merits, a reference at the hearing to the Clerk to take proof and report upon them could not prejudice the defendant, and would not be error of which he could complain.
3. **SAME.** *Whether land sold under vendor's bill should be divided not an issue on the merits.* Whether land sought to be sold under a vendor's bill can be divided or should be sold in a body is not a matter in issue on the merits, and may be ascertained by reference after a hearing on the merits.
4. **SAME.** *Instant reference may be ordered.* Under our practice the law presumes that the parties litigant are present in Court during the term, and the Court may order a reference to be executed instant, with or without notice to the party or his solicitor, and error cannot be assigned upon the discretionary action of the Chancellor in this regard, without showing facts which establish an improper exercise of the discretion to the injury of the parties.

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5. **SAME.** *Cross-bill filed after trial term will not stay hearing of original cause.* Where an application to file a cross-bill is not made until the trial term, the Court, while granting the application, may refuse to stay the trial of the original cause, and should do so where the matters set up constitute no defense to the relief which may be granted.

FROM HAYWOOD.

Appeal from the Chancery Court at Brownsville.

H. J. LIVINGSTON, Ch.

E. J. & J. C. READ for Complainant.

J. W. E. MOORE for Defendant.

COOPER, J., delivered the opinion of the Court.

On the 10th of November, 1874, the complainant, by his attorney in fact, and the defendant entered into an agreement in writing, by which the complainant agreed to sell and the defendant to buy a tract of land described, at the price of \$6,500, for which the defendant was to execute his notes in equal installments, falling due on the 1st of January, 1876, and the same day of each succeeding year to 1881, inclusive, the first note to bear interest at the rate of ten per cent. per annum from date. The defendant further agreed to give a deed of trust on land to secure the payment of the two notes first falling due. The form of the note was agreed upon, and the payment of all the notes was to be secured by a lien on the land sold.

The complainant lived in the State of Illinois, and this agreement, together with a deed in accord-

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ance therewith, and the form of the proposed note, was sent to him for approval, and for execution of the deed.

On the 11th of November, 1874, the defendant sold to a third person the land on which he expected to give a deed of trust to secure the first two of his notes, taking from the purchaser his three notes at one, two and three years for \$800 each.

The complainant having approved the sale, sent back his deed executed in conformity with the agreement of sale, which was delivered to the defendant, who gave his notes for the purchase money as agreed upon. But instead of making a trust conveyance to secure the first two of the notes, according to the written agreement, the defendant, by endorsement in writing, assigned the three notes, for which he had sold the land to the complainant, as collateral security for the payment of said first two notes, the endorsements, signed by the defendant, expressly specifying that the note were assigned as "collateral security."

The defendant at once went into possession of the land under the sale.

This bill was filed on the 1st of February, 1877, to enforce the lien reserved in favor of the complainant, on the land sold to the defendant, for the payment of the purchase money, the first two notes being then past due and unpaid, except a credit of \$525 derived from the collaterals and applied to the first note.

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Upon a final hearing the Chancellor rendered a decree in favor of the complainant, and ordered the entire land to be sold under the provisions of the statute. Defendant appealed.

The defense set up in the answer of the defendant was that the three notes assigned by the defendant to the complainant were assigned and received in payment of the first two of his own notes, and not as collateral security.

The Chancellor held otherwise, and his ruling is made a ground of error.

The assignment on the notes being in writing, and expressly specifying on their face that the notes were assigned as collateral security, parol evidence was inadmissible to contradict them. But the parol testimony leaves not a particle of doubt that the defense was without a shadow of foundation, and this, too, even if the complainant's deposition be excluded.

It is next objected that the Chancellor erred in decreeing a lien on the land for the attorney's fees.

Each of the defendant's notes for the purchase money recites that it is for one of the payments on the land sold by the complainant to him, and adds: "Should this note be sued on, I agree to pay reasonable attorney's fees for the collection of the same."

The deed of the complainant to the defendant, conveying the land, after describing the notes, provides: "It is hereby expressly agreed and under-

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stood that a lien be and is hereby expressly retained on said land for due payment of said notes." The description of the notes in the deed does not include the stipulation for the payment of attorney's fees, but it identifies the notes, and the defendant admits that these were the notes given for the land. The lien reserved is for the payment of the notes, and necessarily covers any legal stipulation therein contained. It is not insisted by the defendant that the stipulation in question was in any way illegal.

It is argued that the Court erred in making in the decree adjudging the right of the parties a reference to the Clerk and Master to ascertain the amount of the fees which could be claimed under this stipulation. The argument is that the proof should have been taken in advance of the hearing. Strictly the point is well taken, although the Court would be slow to revise the discretionary power of the Chancellor to allow omissions of evidence to be supplied in the mode adopted. But in this case there is proof, taken before the hearing, of what would be a reasonable fee for a suit on these notes, the proof, made by one of the complainant's solicitors, being in accord with the testimony taken on the reference; and there is no evidence to the contrary. The Chancellor might, and probably ought to have ruled on the point without a reference, and the reference certainly did not prejudice the defendant.

The reference to ascertain whether the land

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could or could not be divided stands upon a different footing. That was not an issue on the merits, but as to the mode of sale after the merits were determined. The Chancellor had full power to make it, and the order requiring a report instanter during the same term, the Court had the undoubted power to prescribe the length of notice of the execution of the reference, and that it should be served on the solicitor instead of the party. The law presumes, under our practice, that the party to a suit is in attendance during the term, and notice upon the solicitor is, in such case, notice to him. No doubt, upon proper application, the Chancellor would so exercise the power the law confers upon him over the parties during the term, that no injustice should be done. No such application was made in this case. The burden is upon the appellant to show facts establishing an abuse of the judicial discretion. The exceptions to the Clerk and Master's report upon the reference, where not frivolous, were based upon the mistaken notion as to the power of the Chancellor. They were properly overruled.

At the term of the Court at which the cause was heard by the Chancellor, the defendant undertook to file a cross-bill without permission. Upon motion, after the cause was called for trial, the Chancellor ordered it to be taken from the files. The defendant then moved the Court for leave to file it as a cross-bill, and for a stay of proceedings in the original cause until the matters of the

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cross-bill were ready for hearing. The Chancellor refused the motion, but expressed a willingness to allow the bill to remain on the files as an original bill. The defendant, during the progress of the trial, twice renewed the motion, proffering, upon the last application, the bill with an amendment sworn to by his client. The Chancellor disallowed the first of these motions, but on the last occasion he allowed the bill and amendment to be filed, so as not to delay the hearing of the original cause. He suggested that if the defendant desired he might incorporate the amendment in his bill, and file the same as an original bill.

The Chancellor was undoubtedly right in all these rulings. It was in his discretion, even if the application disclosed a proper case for a cross-bill, to refuse to stay the trial of the original cause: *Brown v. Bell*, 4 Hayw., 287. The grounds of the proposed bill were that there were defects not specified, in the complainant's title, and an encumbrance on the land which is specified. A mere averment that there are defects of title, without stating facts from which the Court can see that defects do exist, is, of course, mere sound, signifying nothing. But the authorities are uniform that a defect of title is no defense to a bill to enforce the vendor's lien: *Hurley v. Coleman*, 3 Head, 265; *Curd v. Davis*, 1 Heis., 574; *Jones v. Fulghum*, 3 Tenn. Ch., 200. It may be a defense to a money decree for the surplus after exhausting the property, under some circumstances, but

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the Chancellor expressly reserved the rendition of a formal decree until after a sale of the property. Ordinarily, the vendee in possession under a deed must rely upon the covenants of his deed: *Topp v. White*, 12 Heis., 175. The existence of an encumbrance would be matter for an original, not a cross-bill, and could be of no avail, except as a set-off to a money decree: *Cohen v. Woolard*, 2 Tenn. Ch., 686.

The Chancellor's decree will be affirmed, with costs, and the cause remanded to be proceeded in.

4L 459
10L 114
10L 687

K. G. HICKS v. J. S. SMITH et als.

ASSIGNMENT. *Parol.* Is binding on the assignor. A parol assignment of part of a lien debt, with the right of priority of satisfaction, is binding on the assignor.

FROM MADISON.

Appeal from the Chancery Court at Jackson.
H. W. McCORRY, Ch.

J. L. H. TOMLIN and R. W. HAYNES for Complainants.

Hicks v. Smith.

F. B. SNIPES, C. G. BOND and CAMPBELL &
JACKSON for Defendants.

COOPER, J., delivered the opinion of the Court.

On the 26th of August, 1873, B. M. Hicks sold and conveyed to J. S. Smith several tracts of land for the price of \$6,250, one-third paid in cash, and the residue secured by two notes in equal installments, at one and two years, for the payment of which a lien was expressly retained on the face of the deed. In February, 1876, the greater part of these notes remained unpaid. At that time, one David Rice held a judgment against B. M. Hicks for \$1,182.03 and costs, and was pressing its payment. Hicks was, in his turn, pressing Smith on his purchase notes for money to meet this judgment. Rice was at the same time indebted to J. P. Thomas, in an amount larger than the judgment. Under these circumstances, Hicks, who lived in Dyer county, came to Madison county, and proposed to Thomas that if he would give Rice a credit on his indebtedness for the amount due upon the judgment, and take a mortgage from Smith on the land sold for the same amount, he, Hicks, would give him priority of lien on the land to the extent of the debt thus secured. Thomas either declined the proposition or took time to consider it. About ten days afterwards, on the 7th of February, 1876, the parties met in Jackson, and Hicks took Smith and

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Thomas to his lawyer, and caused a mortgage of the land from Smith to Thomas to be drawn up, reciting the arrangement in reference to the various debts, and securing Thomas for the amount of the Rice judgment, after deducting \$300 paid in cash by Smith to Thomas.

On the 2nd of January, 1877, K. G. Hicks, a brother of B. M. Hicks, filed the first of these bills, claiming to be the holder for the value of the purchase money notes of Smith for the land, and asking that the land be sold in satisfaction thereof.

On the 3rd of August, 1877, J. P. Thomas filed the second of these bills for the foreclosure of his mortgage, making B. M. Hicks and K. G. Hicks defendants, and claiming a priority of satisfaction for his debt.

The cases were consolidated, and such proceedings were had that a final decree was rendered in favor of each complainant for the amount of his demand, but giving Thomas a right to be first satisfied out of the proceeds of the sale of the land.

By consent of parties, the land had been sold pending the litigation, and the proceeds of sale were insufficient to pay both debts.

The case is before us by the appeal of B. M. and K. G. Hicks.

The first point made for the reversal of the decree below is that, even if B. M. Hicks did make a valid agreement with Thomas to give his mort-

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gage debt the right to be first satisfied out of the proceeds of sale of the land, the complainant, K. G. Hicks, is a *bona fide* purchaser of the original notes of Smith, and not bound by the agreement. But neither B. M. Hicks nor K. G. Hicks, in their joint answer to the bill of Thomas, set up the defense that the latter was a purchaser without notice of the complainant Thomas' equity. They say that B. M. Hicks was indebted to his father and another brother, and transferred the notes, then long past due, to secure the indebtedness to the father and brother.

Thomas, in his bill, charged that the assignment was without consideration, and intended to prejudice him in the assertion of his rights.

Both defendants deny the fraudulent intent, and claim that the transfer was made to secure valid indebtedness, but do not insist upon any want of notice of the complainant's equity. Neither in the answer, nor in the deposition of B. M. Hicks is the precise amount of the alleged indebtedness to his father and brother stated. Nor is the deposition of the father or brother, or of K. G. Hicks taken. The father died before or pending the litigation, and his will, introduced in evidence, fairly indicates that whatever notes of B. M. Hicks had been taken by the father were intended merely as an evidence of advancements to be accounted for in the equal distribution of the father's estate among his children. Besides, the supposed transfer of the notes bears date the 30th of Jan-

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uary, 1876, and the proof shows the possession and control of the notes by B. M. Hicks after that date.

To meet this suggestion, the answer states that the transfer was made on the 30th of January, 1877, and that a clerical mistake was made in the year. But, in his deposition, B. M. Hicks states that the transfer was made only a few days after the execution of the mortgage of Smith to Thomas, and when his attention was called to the fact that the mortgage was executed in February, 1876, he concedes that there was a mistake in the month also. The Chancellor was of the opinion that these mistakes were more numerous than was exactly consistent with a straight tale, and he declared that the transfer was merely colorable. In this conclusion we fully concur.

The next point made for reversal is, that at the date of the execution of the mortgage to Thomas, there was no agreement to give him priority of satisfaction. B. M. Hicks admits that he, in his first application to Thomas to make the arrangement, did propose to concede to him such priority. He insists, however, that Thomas refused the offer, and the final arrangement was made between Smith and Thomas, ten days afterwards, according to the answer; a month or six weeks afterwards according to his deposition.

Thomas testifies that he did not refuse the proposition, and accepted the mortgage, and gave Rice a credit for the amount thereby secured,

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under the belief that he was to have priority according to B. M. Hicks' proposition.

The proof is, that Hicks remained until the matter was consummated, took the parties to his own lawyer, and had the mortgage drawn at his expense. He does not pretend that he ever formally withdrew his original proposition, or gave Thomas any reason to suppose that he was not to have the benefit of it. In his deposition, Hicks expressly says that Thomas thought that his deed gave him the first right on the land.

The evidence of Smith is that Hicks told him that Thomas was to have priority of satisfaction.

Under these circumstances, we concur with the Chancellor in thinking that the whole was one transaction, and that the consummation was under the original proposition.

It is argued that the previous conversations and parol agreements were merged in the mortgage, the written instrument with which the business was consummated, and evidence was not admissible of the oral negotiations. But this would be to treat the mortgage as a writing embodying the contract between Hicks and Thomas, which it clearly is not. It was only an instrument by which a part of that contract was carried out. The contract between Hicks and Thomas was never reduced to writing at all.

It has not been argued that a parol contract may not be valid, by which one mortgagee or holder of a lien on land for a sufficient consider-

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ation, waives that lien in favor of another mortgagee; and whatever may be the general rule on the subject, there can be no doubt that a mortgagee may assign part of his debt and stipulate that the assignee may have the prior right of satisfaction.

The order in which the installments of a debt secured by lien may be paid, rests upon principles of equity, which differ in different States: 1 Lea, 695.

That order may, as between the immediate parties, be controlled by contract: *Ewing v. Arthur*, 1 Hum., 537; and no reason occurs why the contract may not be in parol; for it would be simply setting apart a particular fund for the payment of the debt: 1 Ves., 280, 477, cited in *Ewing v. Arthur*. That is, in effect, this case. And, moreover, the promise would be operative by way of estoppel on the ground of fraud.

The Chancellor's decree will be affirmed with costs.

Gayle v. State.

4L 466
16L 511

T. C. GAYLE v. THE STATE.

CRIMINAL LAW. *Carrying arms. Officers.* Officers with criminal process to execute may lawfully go armed, but Sheriffs, Constables, Trustees, and other officers with mere civil process to execute, are liable to indictment for carrying a pistol, except as prescribed by statute.

FROM MADISON.

Appeal in error from the Common Law Court of Madison County. H. W. MCCORRY, J.

J. L. H. TOMLIN for Gayle.

Attorney-General LEA for the State.

McFARLAND, J., delivered the opinion of the Court.

The question in this case is whether a back tax collector, while *bona fide* engaged in distraining property for the collection of taxes, is under the exception of the statute against carrying arms.

That part of the 3rd section of the Act of 1879, chap. 186, material to be noticed is as follows: "The provisions of this Act shall not apply * * to any officer or policeman while *bona fide* engaged in his official duties in the execution of process, or while searching for or arresting criminals, nor to persons who may have been summoned by such

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officer or policeman in the discharge of their said duties, and in arresting criminals and in transporting and turning them over to the proper authorities."

A tax collector is an officer. The tax list in his hands is such process as authorizes him to distrain the property of delinquents, and while doing so he is engaged in the discharge of his official duty in the execution of process, and so it may be said the case is within the letter of the statute.

Nor would we be at liberty to disregard the plain language used upon what we might suppose to be the better policy in such cases. We may, however, look to the general objects and purposes of the Legislature, and adopt a construction consistent therewith, provided it is not in conflict with the clearly expressed intention of the Act itself. All the recent legislation upon the subject has manifested a strong purpose to suppress the pernicious habit of carrying concealed weapons, and it cannot be supposed that the Legislature intended to extend the exception to such an extent as impairs the force of the prohibition, or to allow the unnecessary use of such weapons. To exempt from the provision of the Act every constable or other officer who may have a warrant or other mere civil process to execute, and every tax collector who may distrain for taxes, and other officers in the execution of mere civil process, would not be consistent with the general objects of the law.

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It cannot be said that there is any necessity for the use of arms in such cases. The duties to be performed do not need to be enforced with a pistol; while on the other hand, in the execution of criminal process, or in searching for or arresting criminals, there may be a real necessity for allowing officers to provide themselves with the means of preventing resistance. In this view, looking to the objects and purposes of the law, we think the Act should be construed to exempt only such officers as may be engaged in the execution of criminal process, or arresting or searching for criminals. The word "officer," used in the Act, means officer engaged in the discharge of duties pertaining to the execution of the criminal law or preserving the public peace. The connection in which the words "officer or policeman" occur shows the sense in which they were used. Such was the opinion of the Circuit Judge, and the judgment of conviction should be affirmed. A contrary construction would allow a great body of the civil officers of the State, who should be the conservators of the peace, to violate, with impunity the salutary restrictions placed upon the balance of the community.

Affirm the judgment.

 Tyner v. Fenner.

4L 469
16L 306

FANNIE TYNER et als. v. THOMAS B. FENNER.

1. **TENANTS IN COMMON.** *Bill for partition. Account for profits.* As an incident to a bill for partition, an account of profits will be ordered where one tenant has occupied and used the entire land, and is shown to have made a profit over and above the mere use, and beyond his share.
2. **SAME.** *Rents. Improvements.* If such tenant be charged with an occupation rent, and has cared for the property as his own, the rent should be calculated upon an average for the whole term of occupancy, and he should be allowed such usual repairs as a prudent landlord would make on his own property, or would allow to the tenant as a deduction on the rent, and for the value of permanent improvements as an offset to the occupation rent, unless the land can be, or has been, so allotted as to include the improvements in the share of the occupying tenant.
3. **STATUTE OF LIMITATIONS.** *Will not run against note executed to a Clerk.* The statute of limitations does not run in favor of the maker or sureties of a note executed to a Clerk for property sold in the progress of a suit in court, and while the note is in the custody of the law.

 FROM MADISON.

Appeal from the Chancery Court at Jackson,
H. J. LIVINGSTON, Ch.

H. E. JACKSON for Complainants.

H. W. MCCORRY for Defendants.

COOPER, J., delivered the opinion of the Court.

In February, 1862, Lucy M. Fenner departed this life intestate, and the defendant, Thomas B. Fenner,

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one of her children, was appointed early in the succeeding month administrator of her estate, and qualified as such.

Her heirs and distributees consisted of five children and a grandchild, the son of a deceased daughter, whose husband also survived. Richard Fenner, one of these children, died on the 27th of May, 1862, leaving surviving him his widow, Fannie, and three children, who are the complainants in this bill. Lucy M. Fenner owned at the time of her death a tract of land of about 250 acres, which she had rented to one of her sons-in-law. The son-in-law continued to occupy the land until 1867, when the defendant took possession and occupied it exclusively afterwards.

Lucy M. Fenner had under her father's will, a life estate in six slaves, with remainder in her children. Shortly after her death, the owners in remainder of these slaves filed a petition in the County Court for their sale for division, and they were sold about the 6th, and the sale was confirmed on the 8th of May, 1862. Four of the parties interested bought one of the slaves each, another was bought by one Harris, and the last by one Adams. Thomas B. Fenner purchased one of the slaves, giving his note with security for the price, payable to the clerk of the court, and he went security on each of the three notes given by the other parties interested, for the slaves bought by them. Adams and Harris each gave a note with security for the slave bought by him.

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On the 1st of March, 1866, Harris paid his note originally \$925, and then amounting to \$1,110.39, of which \$693 were paid in an account he held on Ann M. Fenner, one of the owners of the slaves, and the residue in money, for all of which the defendant gave the Clerk of the County Court a receipt. None of the other notes were ever collected, but are held by the Clerk, the suit being still pending, although no step has been taken in it, so far as appears, since the payment of the 1st of March, 1866.

This bill was filed on the 6th of October, 1874, by the widow and children of Richard Fenner, one of the sons of Lucy M. Fenner, against Thomas B. Fenner, for an account of his administration, for partition of the land, and to hold the defendant liable for the rents of the land and for the proceeds of the sale of the slaves.

The bill stated that no administration had ever been had in this State on the estate of Richard Fenner, who had resided with his family in the State of Mississippi, and asked that an administrator be appointed under the statute, if necessary.

In the progress of the suit, so much of the bill as sought an account of the defendant's administration of his mother's estate was abandoned, and the land was partitioned to the satisfaction of the parties.

The contest was narrowed down to the question of the liability of the defendant for the rents of the land, and the proceeds of the sale of the

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slaves. An account was taken in the Court below upon a general reference, without adjudicating any of the rights of the parties, to which exceptions were filed by both sides.

The Chancellor acted upon these exceptions, adjudged the rights of the parties, and again referred the cause to the Master to re-cast the accounts in conformity therewith.

Both parties appealed.

A demurrer was filed by the defendant in the form of a general demurrer to the whole bill, assigning various causes, some of which went to the whole bill, and some to particular parts. It is too clear for argument, however, that the complainants, through the personal representative of their husband and father, whose appointment was asked for in conformity with the statute, were entitled to an account of the defendant's administration with a view to the recovery of their distributive shares, no objection being taken to this relief for want of parties. None of the causes assigned met this equity, and the demurrer being bad in part was bad altogether. The objection of multifariousness was taken, but, by statute, the uniting in one bill of several matters of equity, distinct and unconnected, against one defendant is not multifariousness: Code, sec. 4327.

The demurrer was properly overruled.

The bill seeks to charge the defendant with the rents of the land while in the occupation of his brother-in-law, who had been put in possession by

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the intestate, and also for rents during his own occupation. It does appear that the defendant, after his mother's death, took the notes of the brother-in-law for the rents, and made some collections. To the extent of his actual collections, he is clearly bound to account to the complainants for their share. There is no ground for holding him liable beyond these collections, the tenant being shown to have been insolvent, and to have taken the benefit of the bankrupt law.

The authorities are not in accord upon the point of the liability of one tenant in common to his co-tenants for the use and occupation of the common property. We have a strong intimation that such liability exists at law in this State in the opinion delivered by Totten, J., in *Blanton v. Vanzant*, 2 Swan, 276. And the right to an account seems to be generally conceded in equity as an incident to a bill for partition: 1 Story Eq. Jur., sec. 655; *Hitchcock v. Skinner*, 1 Hoff. Ch., 21; *Backler v. Farrow*, 2 Hill. Ch., 111; *Pascoe v. Swan*, 27 Beav., 508. The mere fact of one tenant having occupied the property will not of itself make him liable for an occupation rent. The effect of such a rule would be that one tenant in common, by keeping out of the actual occupation of the premises, might convert the other into his bailiff, and prevent him from occupying them except upon the terms of paying rent: *Lorimer v. Lorimer*, 5 Mad., 363; *Henderson v. Eason*, 2 Ph., 308. It must be distinctly shown that he has

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made a profit over and above the mere use, and beyond his share. It is the actual receipt of such excess which creates the liability; and, as the claim is not of strict legal right, if he is charged with an occupation rent, he should be allowed such usual repairs as a prudent landlord would make on his own property, or allow to the tenant as a deduction from the rent, and for permanent improvements, as an offset to the occupation rent. *Teasdale v. Sanderson*, 33 Beav., 534; *Hall v. Piddock*, 6 C. E. Green, 311; *Respass v. Breckinridge*, 2 A. K. Mar., 581; *Conklin v. Conklin*, 3 Sandf. Ch., 64.

The same end may sometimes be attained by allotting the land so as to make the occupying tenant's share include the improvements: *St. Felix v. Rankin*, 3 Edw. Ch., 323; *Brookfield v. Williams*, 1 Gr. Ch., 341; *Dean v. O'Meara*, 47 Ill., 120; *Sneed v. Atherton*, 6 Dana, 276. These principles are recognized by this Court in *Coleman v. Pinkard*, 2 Hum., 191.

The defendant did occupy the land in controversy, and receive the entire profits from 1867, and it appears that these profits were in excess of his interest in the land. He had purchased and owned four-sixths of the land, and seems to have cultivated, improved and managed it as if it were altogether his own.

There were about 120 acres of cleared land fit for cultivation, though all of this land was not kept under cultivation every year. Before the de-

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fendant went into possession, the land had rented for \$250 each year, until the year or two immediately preceding, when it rented for \$300. For a series of years of varying seasons, where the land was not cultivated to its utmost capacity, the latter figures are a full rent. The Clerk and Master erred, therefore, in charging the defendant with \$350 a year. Interest in such cases, where no demand has been made before suit brought, is not a matter of right, and ought not to be allowed during the war, the complainants then being within the Confederate lines, and the land and the defendant within the Federal lines. On the other hand, no interest should have been allowed on the value of the permanent improvements. The result of these changes will be to reduce the balance found by the Clerk and Master. We find that the amount due as of this date will be about \$650, and we fix upon that sum as a near approximation to the true amount without further account.

It was agreed by the parties that the sale of the negroes by the Clerk of the County Court was duly reported and confirmed on the 8th of May, 1862, and the title of the slaves divested out of the owners and vested in the purchasers by the same decree. It was further agreed that the cause in which the sale was made is undisposed of, and still pending; that the note given by the defendant, and the notes on which he became security, are unpaid, the makers of the last

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three notes being either dead or non-residents of the State; and, further, in order to avoid the necessity and expense of separate proceedings in the County Court to enforce the collection of the notes, or the necessity of complainants amending their bill, that complainants, or either of them, may, to the extent of their interests in said notes or the fund they represent, have the same included in the account herein ordered, and charge the defendant as the joint maker of said notes, with the amount of their share or interest in the same, provided the defendant could be made liable thereon by any appropriate proceedings against him for the payment thereof in the County Court, subject, by way of exceptions to the charge, to any defense which the defendant could make against the payment of said notes under proper proceedings in the County Court for their collection.

This Court has held that the statute of limitations does not run in favor of the maker or sureties of a note executed to the Clerk for property sold, or other sufficient consideration, in the progress of a cause, and while the note is in the custody of the law: *Owen v. Nelson*, Dec. Term, 1874, at Nashville, cited in *Gold v. Bush*, 4 Bax., 579. The reason is, that the parties to such instruments by their execution and delivery to the Court, become parties to the suit, so that proceedings may be taken against them without notice, and they may appear and defend, and have the benefit of proceedings for the correction of errors.

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In this view, the original suit in the County Court being still pending and the notes themselves in *custodia legis*, the right of any party interested in the proceeds of the sale of the slaves to go into the County Court and enforce the collection of the notes seems to be clear, unless there is something else in the case which will enable the defendant to resist their payment.

The defendant says, in his deposition, there being no other evidence on the subject, that there were six negroes, and the parties interested agreed each to buy a negro, and thus easily arrange the matter among themselves. One of the parties, Ann M. Fenner, was indebted to N. G. Harris, and agreed that he might buy her negro and pay himself out of the proceeds. Harris did, accordingly, buy one of the negroes, and give his note for the price, and defendant, having bought his sister's interest, settled with Harris on the 1st of March, 1866, taking up Harris' debt against his sister, which the latter had agreed to receive in part consideration for her share. "My brother Richard," says the witness, "was in the army at Corinth at the time, and could not get here to the sale, and wrote me word to buy him the girl, Polly, which I did for him. Some month or two after the sale he came home sick, and, as he could not send the negro to his house, in Mississippi, he asked me to take her, and he would take the Adams note instead of the girl, to which I agreed. I took and kept the girl."

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Unfortunately, or perhaps fortunately for the defendant, he had stated in his answer that Richard Fenner had sent word to have a negro bought for him, but, the other heirs, not caring to assume the responsibility, did not do so, and one Adams purchased the other negro, and, as respondent supposes, complied with the terms of sale.

Adams' note, with security, is produced by the Clerk, showing that the terms of sale were complied with by him. And the defendant, in answer to the very next question put to him, as a witness, says, "I mean that Adams bought the negro which I was to buy, he paying or bidding more than I was willing to pay, and he (meaning Richard Fenner) agreed to take that note instead of the negro girl."

The witness does not, however, explain what he means by saying that he took and kept the girl. The sale of the slaves was on the 5th of May, 1862, and the defendant says elsewhere in his deposition that Richard Fenner died early in June, the bill says the 27th of May, 1862. It is very clear that time has obscured the defendant's recollection, and that Richard Fenner made no arrangement on the subject. But if he ever did agree to take the Adams note it was an agreement never carried out, not binding for want of consideration, and because not made with the parties having a right to control the Adams note. The witness admits that he, and perhaps the husband of one of his sisters, were alone present at the alleged conversation. There

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is nothing in the statements of the witness to bar the father, if alive, or his representatives from claiming his proportion of the proceeds of sale.

His share would be one-sixth. The Adams note has never been collected, and as the defendant is no more in fault for the failure to collect it than any of the other parties, he cannot be held liable for any part of it. Nor can he be held liable for so much of the Harris note as was paid in the account of Ann M. Fenner. To this extent, the consideration was paid to her, although through the hands of the defendant, and she is not before the Court so as to enable the Court to adjust the equities between the parties.

The complainants, as we have already seen, resided within the Confederate lines during the war, and the defendant within the Federal lines, and no interest ought to be charged against him, except such interest as may have been included in the payment made to him by Harris, up to the 1st of July, 1865.

It appears in the record that Richard Fenner became a purchaser of personal property at the administration sale of the defendant, and it was the fact, no doubt, that his liability in this regard exceeded his share of those assets that occasioned the abandonment of the administration account. The defendant has long since become liable for the amount due to the distributees by reason of this note. He ought, under the circumstances, to have a credit in this account for any excess of Richard

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Fenner's debt over his share of the personal estate. Strictly speaking, the notes for the sale of the slaves could only be enforced in the name of a personal representative of Richard Fenner. He was a non-resident of the State at his death, and there has been no one in this State against whom suit could have been brought to enforce the collection of the claim held by the defendant against him. The action was not barred at the time when the act of 1865, chap. 10, sec. 8, (Code, sec. 2762b,) was passed. By this act the time of absence or residence out of the State is not to be counted as any part of the time limited for the commencement of the action. The amount of Richard Fenner's purchases was \$502.90. The share of his representatives, was found by the Master, on the 15th of December, 1876, calculating interest on the debits and credits to that date, to be \$356.10. By calculating interest on the former sum from the date of sale, or expiration of the credit given without interest, to that date, and deducting the latter sum, the remainder, with interest from the 15th of December, 1876, to the date of ascertaining the defendant's indebtedness on the slave notes, would be a proper credit to be deducted from the latter debt.

The Chancellor's decree will be reversed, and a decree entered in accordance with this opinion, and a reference made to the Clerk to recast the accounts as directed.

The defendant will pay the costs.

Porter v. Cobb.

THE STATE for use B. T. PORTER v. T. D. COBB et al.

EXEMPTION. *Commissioner's costs.* Costs taxed in favor of a commissioner for partition of lands, and collected by execution, are not exempt in the officer's hands from application by him to the satisfaction of a *fi. fa.* in his hands against the party for costs in another case.

FROM LAUDERDALE.

Appeal in error from the Circuit Court of
Lauderdale County. T. J. FLIPPIN, J

W. E. LYNN for Porter.

THOMAS STEELE for Cobb.

McFARLAND, J., delivered the opinion of the
Court.

Porter was appointed a commissioner in a
County Court proceeding for the partition of land,
and rendered services for which he was entitled to
\$16, which sum was taxed in his favor in the bill
of costs.

Cobb, the Sheriff, collected the costs under ex-
ecution, including the sum due Porter.

About the same time there came to Cobb's hands
an execution against Porter from the Supreme Court,
and Cobb satisfied the same by applying thereto

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\$18.98 of the money in his hands belonging to Porter, as before stated, and paid over the balance.

Porter brings this suit to recover the \$18.98, and alleged that Cobb had no right to apply it to the satisfaction of the execution, because it was exempt under the Act of 1870-71, T. & S. Code, sec. 2107a, which enacts that "There shall be exempt from execution, attachment or garnishment thirty dollars of the wages of mechanics or other laboring men."

Porter was a Justice of the Peace, engaged also in the practice of law before Justices of the Peace, under license, and was also a farmer and labored upon a farm, and, to use his own language, "had a tight time" to make a living with all he could do, his family consisting of himself, wife and one daughter.

Without undertaking to define what class of laboring men fall within the statute above referred to, or what wages are exempt, we hold that the exemption does not apply to the present case.

2nd, It is argued that the money was exempt upon the principle that the salaries of public officers are exempt, as held in the case of the *Bank of Tennessee v. Dibrell*, 3 Sneed, 379

We are of opinion, however, that this principle does not apply to the present case.

The judgment against the plaintiff will be affirmed.

Tarrant v. State.

41 483
131 407

JOHN D. TARRANT v. THE STATE.

CRIMINAL LAW. *Carrying pistol. Fine and imprisonment.* Imprisonment for unlawfully carrying pistols is within the discretion of the Court trying the case, and this Court will not interfere to remit imprisonment imposed in such cases, except where a gross abuse of this discretion is shown.

Under Code, sec. 5251, Courts rendering final judgment have no power to remit fines where the amount of the fine is fixed by statute, as in the case of unlawful carrying arms.

FROM LAUDERDALE.

Appeal in error from the Circuit Court of
Lauderdale County. T. J. FLIPPIN J.

STEELE & STEELE for Tarrant.

Attorney-General LEA for The State.

McFARLAND, J., delivered the opinion of the
Court.

The plaintiff in error was convicted under the Act of 1879, chap. 186, of carrying a pistol; was adjudged to pay a fine of \$50 and the costs, and to be imprisoned ten days in the county jail, and also required to enter into recognizance to keep the peace. He complied with the latter requirement, and thereupon moved the Court to remit the

Tarrant v. State.

fine and imprisonment, which, being refused, he has appealed in error.

It is not insisted that there is any error in the judgment of conviction; but it is argued that the guilt is only technical; that the pistol was carried at the time in self-defense, and that the Judge below improperly exercised his discretion in making imprisonment part of the punishment, and also in refusing to remit the fine.

The Act under which this punishment was made, in terms provides, that, upon conviction, the offender "Shall be fined \$50 and imprisoned in the county jail of the county where the offense was committed, the imprisonment only in the discretion of the Court."

We may concede it was in the discretion of the Judge below to remit the imprisonment, as it was within his discretion to make imprisonment part of the punishment or not as he might deem proper.

It is doubtful whether an appeal to this Court can be sustained alone for the purpose of revising his discretion in this respect. We have in one or two instances exercised the power of releasing the imprisonment, but with great doubt as to propriety of doing so.

But, conceding that the power exists, its exercise in cases of this character would be unwise and injudicious.

The Legislature, by the recent Act referred to, has increased the punishment for these offenses,

Tarrant v. State.

thereby manifesting a decided purpose to suppress the crime.

We have no inclination to defeat the legislative intent in this respect—it is certainly not our duty to do so. Matters of this character are properly left to the sound discretion of the Judges below, who are in a better condition to act properly in this respect than we can be, and we cannot condemn them for exercising their discretion in a manner calculated to suppress the offenses. To interfere with the exercise of their sound discretion in this respect, would tend to embarrass the administration of the criminal law, and defeat the objects had in view by the Legislature. However, we do not say what we would do if a case of very great abuse of discretion by the Judge below was before us. It does appear that the plaintiff in error in this case was apparently acting in self-defense, and that his character was good, but we decline to interfere. The matter may still be under the control of the Court below, where the cause is remanded for the execution of the judgment, and the application may then be renewed.

As to the application to remit the fine, we have held that the Court below had not the power in a case of this character. It is true that sec. 5251 of the Code gives the courts rendering final judgments the power, for *good* cause, to release fines and forfeitures due the State; but, in these cases, where the amount of the fine is fixed by the statute, it would be a clear evasion of the law

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for the Court, after adjudging the fine fixed by law, to at once, without any other cause shown than the merits of the case, remit it. This would be an attempt to observe the form of the law, and at the same time wholly avoid its spirit and force.

Affirm the judgment.

4L 486
9L 368

 LATTI et al v. SARAH E. SUMEROW, adm'x, et al.

1. ADMINISTRATION. *Insolvent estates. Statute of limitations.* The failure to file a claim in an insolvent proceeding within two years and six months from the grant of administration, will not of itself be a bar where a separate suit has been brought in due time and prosecuted to judgment.
2. SAME. *Same. Same.* Upon the filing of an insolvent bill in Chancery the Chancellor may enjoin the further prosecution of pending suits, and a judgment taken in violation of the injunction is not conclusive evidence of the claim, but the claim is not for that reason alone to be rejected.
3. Case modified. *Martin v. Blakemore*, 5 Hels., 50 : in accord *Bibb and Hudson v. Tarkington*, 2 Lea. 21.

 FROM LAUDERDALE.

Appeal from the Chancery Court at Ripley.
H. J. LIVINGSTON, Ch.

Latta & Sumerow.

THOMAS STEELE for Complainants.

LYNN, OLDHAM & CONNOR for Defendants.

McFARLAND, J., delivered the opinion of the Court.

This is an insolvent bill and comes before us upon the appeal of Jo. W. Enochs, whose claim was disallowed. Jesse M. Sumerow died intestate in Lauderdale County, and Sarah E. Sumerow was appointed administratrix of his estate, and, on the 1st of April, 1876, suggested the insolvency of the estate to the Clerk of the County Court.

On the 7th of July, 1877, the present bill was filed by the complainants in behalf of themselves and all other creditors of the estate, who might come in and make themselves parties, for the purpose of administering the estate as an insolvent estate in the Chancery Court, making the necessary allegations to give the Court jurisdiction.

At the May term, 1878, the Chancellor pronounced a decree adjudging that the bill was properly filed, and "sustaining" it as an insolvent bill, transferring the administration from the County to the Chancery Court, and "enjoining" all suits at law and other suits "in equity," and requiring all creditors to come in, file their claims and have themselves made parties within five months, and at the same time referred the cause to the Master for a general account.

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Notice of this decree was ordered to be published for four successive weeks in a newspaper, which was done.

In 1872 James W. Enochs filed his bill in the Chancery Court, at Dyersburg, for a settlement of a partnership between himself and Jesse M. Sumerow, who, being then alive, appeared and answered the bill in person. The cause progressed and was still pending when said Sumerow died, and it was revived against the said Sarah E. Sumerow, administratrix, at the August term, 1876.

Subsequently a decree for an account was rendered, which was affirmed in this Court at the April term, 1878, and the cause remanded, and a final decree was rendered on the 21st of April, 1879, in favor of the complainant for \$1,096.20 and costs, which was ordered to be certified to the County Court of Lauderdale County, the decree reciting that the insolvency of the estate had been suggested in that Court. Soon after, on the 27th of May, 1879, the decree was presented by petition in the present cause by the said James W. Enochs, Rupert Levy and Jo. W. Enochs, in which it is represented that the claim belongs to the said Jo. W. Enochs, to whom it has been assigned by Levy, the assignee in bankruptcy of the original complainant, in that cause, James W. Enochs.

It is further stated in the petition that the cause was prosecuted in the Chancery Court, at Dyersburg, by the consent, express or implied, of

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the parties on both sides, for the purpose of settling the rights of the parties without notice of the insolvency of the estate; that in fact they knew nothing of the pendency of the present insolvent bill; that the administratrix permitted the cause to proceed without notice or suggestion that such a bill had been filed; that the final decree in the cause was drawn by one of the complainants and solicitors in the present cause; that the lands have been sold under a decree in the cause, but the fund has not been collected, and of course has not been distributed, nor has a *pro rata* been declared.

An order was entered making petitioners parties, and referring the claim to the Master for a report.

The Master reported, rejecting the claim, setting forth as his reasons the facts hereinbefore stated, and concluding that as the claim had not been filed either in the County Court or in the Chancery Court within two years and six months from the qualification of Sarah E. Sumerow, as administratrix—the petitioners being residents of the State—and the complainants in this bill and said administratrix relying upon the statute of limitations, the claim should on this ground be rejected. This report was sustained by the Chancellor, and the petitioner, Enochs, has appealed.

We think the decree is erroneous. It is well settled that the statute of two and three years in favor of personal representatives applies as well to claims against an insolvent estate as any other,

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and unless suit be brought within the time limited, or excused by request for delay, the demand will be barred. After suggestion of insolvency and notice, or the filing of an insolvent bill, creditors who have not previously sued can only prosecute their claims by filing them and becoming parties in the insolvent proceeding in the mode pointed out by the statute. This then becomes the only mode in which they can sue, and their claim must in this mode be made within the time prescribed by law, that is, within the period of limitation for suits against administrators or executors, two years and six months for residents, and three years and six months for non-residents. But, where suits have already been brought within the time, and before suggestion of insolvency or the filing of an insolvent bill, the question of the statute of limitations is at an end, for there is but the one statute, and the creditor having complied with its requirements his claim is saved from the bar, he is not required to bring another suit, if his first is rightfully brought.

Section 2376 of the Code, in the chapter relating to insolvent proceedings in Chancery, enacts that all creditors who fail to bring suit or come in under these proceedings within "the time prescribed by law," shall be barred. "The time prescribed by law" meaning the statute of limitations. That is to say, creditors who have not previously sued must sue by coming in the insolvent proceeding within the time. Where, however, suits

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have been previously brought and are pending, there is no new statute by which they are to be barred for failing to file the claim in the insolvent proceeding within the time limited after the qualification of the personal representatives.

Where the insolvent proceeding is conducted in the County Court, suits pending at the time of the suggestion of insolvency are allowed to proceed to judgment, then to be certified to the County Court. The suggestion of insolvency and advertisement operates of itself as an injunction against bringing new suits, but not against the prosecution of pending suits: Code, secs. 2332, 2333.

Where, however, an insolvent bill is filed the Chancellor may enjoin the prosecution of *pending* suits or order them dismissed, and require all creditors to have their claims adjudicated in the one proceeding, if, in his opinion, it is proper to do so. Or, on the other hand, he may allow the separate prosecution of such suits as may seem most convenient, or rather, such as it may seem to him inconvenient to have adjudged in the insolvent proceeding: Code, 2383, 2384.

Whether the bill of Enochs in this case was prosecuted in violation of the injunction contained in the Chancellors decree in the present case of the May term, 1878, we need not definitely settle. The Chancellor has not decided the question. Enochs was not made party to the present bill by name, nor is his claim or suit referred to in the bill. We have only the general injunction. If the

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allegations of the petition be true, it would seem clear that there was no purpose to violate the injunction, but the parties and their solicitors, part of whom were solicitors in the present case, by mutual consent, chose to regard the injunction as not applying to the further prosecution of that cause, and this was a reasonable conclusion, inasmuch as it was, no doubt, a case from its nature, proper to be separately prosecuted, and the Chancellor would have so ordered had application been made to him. At all events, if it be conceded that the decree was taken in violation of the injunction, it would not affect the statute of limitations. The suit would still be pending and subject to adjudication. The only effect would be that the decree would, upon proper application, because of the violation of the injunction, be set aside and the parties allowed to contest the claim again. *Bibb and Hudson v. Tarkington*, 2 Lea, 21.

The decree appealed from is against the claim alone upon the statute of limitations, and this is the question before us.

We do not mean to intimate that the Chancellor may not peremptorily require all claims, whether in pending suits or not, to be brought into the insolvent proceeding within a period he may fix, not short of the statute of limitation, and proceed finally to distribute the fund among the claims filed and allowed, without regard to those who fail to come in within the time: *Campbell v. Hancock*, 7 Hum. 75.

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The Chancellor did not predicate his action upon this ground, and probably should not have done so, inasmuch as the claim was presented before the fund was ready for distribution, or before a *pro rata* was allowed. If the Chancellor's original decree of May 1878, which required all claims to be filed within five months, was intended as a peremptory order, applicable as well to creditors who had pending suits as others, still in view of the statements of the petition that all parties had regarded it otherwise as to the Enochs case, the Chancellor should, and no doubt would have extended the time for filing the claim so as to allow it to be filed and participate in the distribution, if indeed it may not be imperative upon him to do so: *Akers v. West*, 1 Bax., 21.

The Chancellor regarded himself bound by the peremptory bar of the statute, and upon this ground alone rejected the claim. His action was, no doubt, founded upon the authority of *Martin v. Blakemore*, 5 Heis. 50, and the theory and reasoning of that opinion does sustain his conclusion, but I am informed by Judge Freeman, who delivered that opinion, that upon a petition to rehear, he prepared another opinion reaching the same result, upon different grounds, warranted by the facts of the case, and that the former, instead of the latter opinion, was inadvertently published. The theory and reasoning of the opinion, as published, upon the point indicated, should therefore not be followed.

Bills v. Polk.

The decree of the Chancellor will be reversed and the ~~cause~~ remanded. The petitioner paying the costs of this court with a decree over for the same against the administrator.

L. BILLS et al. v. O. B. POLK et al.

1. **ATTORNEYS. Services.** An attorney is entitled to a reasonable compensation for his services, if faithfully and intelligently discharged, without regard to the benefit such services may be to his client.
2. **SAME. Same.** An attorney does not guarantee the accuracy of all he does, and is only bound for reasonable skill, knowledge and attention to business entrusted to his care. He is responsible for loss or damage resulting from culpable neglect.

FROM HARDEMAN.

Appeal in error from the Circuit Court of Hardeman County. T. J. FLIPPIN, J.

C. A. MILLER and JESSE NORMENT for Plaintiffs.

F. FENTRESS for Defendants.

Bills v. Polk.

FREEMAN, J., delivered the opinion of the Court

This suit is brought by Thomas K. Smith, the testator of plaintiffs, for professional services rendered defendant's intestate in a suit pending at the death of J. J. Polk, and which was still pending at the death of Smith.

The suit is to recover the value of the services, and is not on a special contract, the averments showing that Smith died before the termination of the suit. A *quantum meruit* is the nature of the action for the value of the service actually rendered.

The services are abundantly proven, and their value fixed by attorneys familiar with them, they showing they were effectually rendered. There is no conflict in the proof on this question.

The defense is rested legally on the ground that an original attachment was not effective to hold the property, by reason of the defective return of the levy by the Sheriff. It is also shown that subsequently an ancillary attachment was sued out, and was deemed necessary by counsel in order to secure the property sought to be made liable in the event of a recovery by plaintiffs.

The theory of the defense is that this defective attachment would have rendered a recovery futile; or, at any rate, that the proceedings were of no value to plaintiffs on account of this defect; and so the services were of no benefit.

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In view of this issue, the Court charged the jury that the right of recovery depended upon the actual value of the services rendered, *and benefit* conferred. This was erroneous, in reference to this issue, and calculated to mislead the jury, and is evidently the ground on which the verdict turned.

Whether a party obtains a benefit or not from the services of an attorney is not the test of his liability to pay for such services. The services are to be estimated at the reasonable value for such services, as work and labor done, at the request of another. This may be faithfully and intelligently done, with reasonable skill, and yet it may be the party receives no benefit as the result.

The property in this case, for instance, may have perished by accident, or deteriorated by decay, so that no benefit would have resulted to plaintiff from recovery. But the services of the attorney were of precisely the same value to the client, as if he had realized the full benefit of the appropriation of the property or its proceeds to his debts. The attorney does not guarantee the accuracy of all he does, but is only bound for reasonable skill, knowledge and attention to the business intrusted to him; nor is he liable for every mistake that may occur in his practice, nor the results that may follow. If he acts with reasonable diligence, and to the best of his skill and ability, he is not responsible. He is bound, however, to have such reasonable skill and ability

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as will enable him to perform the duties he undertakes. For culpable neglect, producing loss, he would be responsible: Wait, Act and Def., vol. 1, 446. The proof shows the possession of competent skill, and the exercise of the utmost zeal and energy in the conduct of this case by Smith. For the reasonable value of these services, he was entitled to be compensated, such value to be fixed by persons having knowledge of the value of such services. Whether they proved of benefit to the defendant's intestate, or not, was not the question, but what was their value, as services or professional work done for him.

Without noticing other questions presented in argument, for this error in the charge of the Court the case will be reversed and remanded for a new trial.

 Sherron v. Hall.

 4L 498
 1pt 616
 2pt 601

 4L 498
 110 644

S. W. SHERRON v. G. A. HALL et al.

1. **PLEADING AND PRACTICE.** *Writ of replevin. Amendment.* A writ of replevin sued out before a Justice by a wife for property seized by the defendant under execution against the husband, may be amended in the Circuit Court by joining the husband with the wife as plaintiff, upon the execution of a new bond.
2. **SEPARATE ESTATE.** *Chattel.* When a chattel is purchased from the husband by a stranger, and at once given to the wife for herself, the transaction, from its very nature, would confer upon the wife a separate estate.
3. **LAW OF SISTER STATES.** *Judicial notice. Query.* Whether this Court will reverse for the want of proof of the law of a sister State, of the existence of which the Court is authorized to take judicial notice.

 FROM HARDEMAN.

Appeal in error from the Circuit Court of Harde-
man County. T. J. FLIPPIN, J.

A. M. LAMBETH, JR., for Complainant.

F. FENTRESS for Defendants.

COOPER, J., delivered the opinion of the Court.

Sherron, as Constable, having in his hands an execution against G. A. Hall, levied on a buggy and harness as his property. Nannie Hall, the wife of G. A. Hall, sued out a writ of replevin before a Justice of the Peace, who gave judgment in her favor, and Sherron appealed.

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In the Circuit Court, upon motion, the writ ~~was amended~~ by making G. A. Hall a nominal plaintiff with his wife, upon the husband giving a new and sufficient replevin bond. Sherron excepted. The case was then tried by a jury, and resulted in a verdict and judgment for Hall and wife.

Sherron appealed in error.

It is assigned as error that the proceedings before the Justice of the Peace were void, because the married woman could not execute a valid replevin bond, and that, consequently, no amendment could be made.

If it be conceded that a married woman cannot give a valid bond, the writ might be amended by allowing her husband or a next friend to be joined as a co-plaintiff upon giving a proper bond. This was what was done in the Circuit Court, in which court, by the appeal, the cause stood for proceedings *de novo*.

A new bond may be given in proper cases: Code, sec. 3392; *Creamer v. Ford*, 1 Heis., 807. The general rule that a defendant in an execution cannot maintain an action of replevin for the goods seized thereunder, only applies when the officer is proceeding rightfully: *Dearmon v. Blackburn*, 1 Sneed, 390. If the officer levy on exempt property, the defendant may sue out the writ: *Wilson v. McQueen*, 1 Head, 17; *Harris v. Austell*, 2 Bax., 151. If the property belong not to the debtor in the execution, but to his wife, there is

Sherron v. Hall.

no reason why he may not join with her as a nominal plaintiff in the writ.

The proof is clear that the property in controversy was bought from the husband by a third person, and at the same time given by the purchaser to the wife, the husband and wife then being resident citizens of the State of Mississippi. The gift was not accompanied with words showing the intention of the donor to give to the separate use of the wife, doubtless because the statute law of Mississippi made the property separate estate by virtue of the gift itself. It is said, however, that there was no evidence offered on the trial of the law of Mississippi, and the bill of exceptions is silent on the subject.

The Code does seem to contemplate the introduction, in the trial court of proof of the law of a sister State, while it allows this Court to take judicial notice of the same law: Code, secs. 3800, 3801; *Hobbs v. M. & C. R. R. Co.*, 9 Heis., 873. It would seem useless to reverse for the want of proof of a law of the existence of which this Court must take judicial cognizance: *Foster v. Taylor*, 2 Tenn., 191. But the gift was in effect as if the husband, for a valuable consideration, had made the conveyance to the wife, in which case the transaction, from its very nature, would confer a separate estate without express words: *Powell v. Powell*, 9 Hum., 477.

Affirm the judgment.

Rainey v. Biggart.

G. S. RAINY, adm'r, v. MARY BIGGART et al.

CHANCERY PLEADING AND PRACTICE. *Sale of real estate. Dower.*

Upon a bill filed to sell a house and lot, and, by consent, one-third of the purchase money goes to the widow in lieu of dower, it is error, on motion, to allow the purchaser to have an account to ascertain the amount of indebtedness of the widow to the purchaser, which is sought to be set off against the sum allowed in lieu of dower.

FROM GIBSON.

Appeal from the Chancery Court at Humboldt.
JOHN SOMERS, Ch.

H. T. JOHNSON for Complainants.

McFARLAND & BOBBITT for Defendants.

McFARLAND, J., delivered the opinion of the Court.

The pleadings in this cause have not been brought up, but it is agreed that the bill was filed to sell a house and lot in Humboldt, to pay the debts of William Biggart, deceased; that the property was sold and bought by the complainant for \$1,000, one-third of which—\$333.33 $\frac{1}{3}$ —was, by consent, decreed to the defendant, Mary Biggart, in lieu of dower. This decree was rendered at the December Term, 1871.

Rainey v. Biggart.

At the January Term, 1876, it was ordered, upon motion of the complainant, that the cause be referred to the Clerk and Master to take additional proof by complainant as to claims paid for defendant, Mary Biggart, by way of accounts in his favor, and whether the amount due Mrs. Biggart in lieu of dower had been paid.

The defendant excepted to this order.

Much testimony was taken, and the Clerk and Master made a report, showing the amount of a store account claimed by the complainant against Mrs. Biggart, beginning as far back as 1868, before the bill in this case was filed, and coming up to 1874, amounting to \$400.28, \$53.10 of which the Clerk and Master reports as not proven. He also reports that complainant paid for Mrs. Biggart to James Campbell \$50 for rent.

On the other hand, the Clerk and Master reported credits or offsets to this account more than sufficient to extinguish it.

There were exceptions by both sides going into the merits of the respective accounts, which were somewhat complicated.

Thereupon, the Chancellor, without considering the exceptions in detail, determined that complainant had fully paid and discharged the amount due Mrs. Biggart for dower. He reached this result by allowing the complainant's account, and all exceptions were overruled or sustained in general terms, so as to reach this result, and no further.

The decree seems to us to be manifestly erron-

Rulney v. Biggart.

eous. It is clear that the money due Mrs. Biggart for her dower has not been paid; it is admitted that it has not. Whether the complainant has a debt against Mrs. Biggart which he can properly have set off against the amount due her in lieu of her dower, is a question in no way involved in this cause. The adjustment of their claims and counter claims is a matter to be settled between them in some appropriate proceeding, and is in no way involved in the present case. No such question can possibly be at issue between the parties according to the statement we have of the case, and it was error to inject this new litigation into the present case by motion simply, especially as it was objected to. The entire matter of these accounts was *coram non judice*.

The decree will be reversed, and the cause remanded to be regularly proceeded with.

The complainant will pay all the costs incident to the taking of said account, as well as the costs of this Court.

Taylor v. Wood.

4L 504
116 257
o116 258

R. F. TAYLOR et al. v. WM. A. WOOD, Adm'r.

COMPENSATION. *For services. Statute of limitation.* Where a party renders service in hope of a legacy in sole reliance upon testator's generosity, without any contract express or implied, no action will lie if no provision be made by will. But where from all the circumstances, it is manifest, that it was mutually understood that compensation should be made by will, and none is made, an action lies to recover the value of such services—but the statute of limitation being pleaded services can only be recovered for six years prior to death of testator.

FROM MADISON.

Appeal from the Chancery Court at Jackson.
H. C. ANDERSON, Sp. Ch.

CAMPBELL & JACKSON, CARUTHERS & MALLORY, R.
W. HAYNES, C. G. BOND, MUSE & BUFORD, and G.
W. FRASER for Complainants.

J. L. H. TOMLIN and BULLOCK & HAYS for de-
fendants.

DEADERICK, C. J., delivered the opinion of the
Court.

The material and most important question in
this case arises upon a claim set up by defendant
for compensation for services rendered his intestate
in her life time.

The question is made in the County Court of

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Madison County, in the progress of the settlement of the administrator's account.

Within two years and six months after Wood's appointment and qualification as administrator of the estate of Mrs. E. C. Martin, he as administrator upon her estate, upon notice by the County Court Clerk to the parties interested in the estate, filed his vouchers for disbursement, etc., and a formal account in favor of himself for 21 years service to intestate, as agent and superintendent of her business affairs, and for medical services rendered her family, at the rate of \$500 per annum.

This claim was mainly contested by the distributees, and upon a reference to the Clerk for an inquiry and report, much testimony was taken. He reported to the Court the amount of receipts and disbursements, to be credited to and charged against the administrator, and showing the total assets of the estate to be about \$10,000. No debts were reported as due from the estate, and the assets consisted chiefly of notes for money loaned. And the charge of the administrator for said services in the life time of intestate, and for services and fees and expenses incident to the administration of the estate, constituted all the charges upon the fund.

The litigation, however, between the administrator and distributees began in March, 1878, when the administrator filed his account for services, and has continued to the present time.

To the report of the Clerk, the administrator

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filed four exceptions, and the distributees, thirty-five, nearly all of which were overruled, and a decree was entered and both parties appealed to the chancery side of the Common Law and Chancery Court of the County of Madison.

The exceptions sustained were allowances to counsel and for services by defendant for a period of about eight months, as administrator *pendente lite*, he having been appointed such pending a contest between himself and another for the appointment of a regular administrator.

The County Court allowed Dr. Wood \$225 per annum, for 21 years, with interest from the death of Mrs. Martin in 1873.

Exceptions from 1 to 23, inclusive are, that the administrator is not charged, as he should be, with the several debts noted. But the report shows that the said claims are in the hands of the administrator, to be accounted for by him. Some of these are upon insolvent persons, and except those, the claims are in fact reported as being chargeable to the administrator.

The administrator makes his inventory and report on oath, and *prima facie* it is taken as true, but may be impeached. It is not shown that the parties reported by him as insolvent, were not so.

The credit of \$2,182.11 is given because the administrator was charged with all the notes, good and bad, and the report shows that more than this amount of "desperate" debts were charged to him. So the \$20,731.70 is not really a credit to

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the administrator, but shows only that amount of the aggregate debt is uncollected.

Contestant's thirty-five exceptions are repeated with some variations, making in all seventy in number. As to those relating to the fees of counsel, by consent, they were remanded to the County Court, and need not be noticed, and as to the allowance for services *pendente lite*, the extra allowances excepted to should have been sustained beyond allowance made by Chancellor, as the sum allowed by him for services and expenses during that period is sufficient compensation under that head. A number of exceptions to small amounts paid by the administrator for which he exhibits vouchers, are taken, which are no doubt proper charges. But the exception No. 23, of the second series of thirty-five, to an allowance of \$303.68 for commission and costs, incident to sale of R. H. Epperson's land, will be so far sustained as to allow the distributees, upon the remanding of the cause, to show that the credit is excessive or otherwise improper. So also as to the credits of \$33.38, being commissions on sale of town lot of J. Y. Keith. The contestants may also have enquiry as to validity of charge for repairs of fence, and whether the \$9.35 for taxes was paid as per voucher No. 39 of County Court record, and they, or some of them, ought personally to know whether the \$1 was paid for registration of the deed to themselves, and they may have like reference as to this and the other small items named in exception

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No. 26, p. 500, of County Court record, and as to matters excepted to by exception No. 27. The Clerk ought to have proved all these payments, and showed their necessity by calling the administrator before him and examining him. But unless there is some ground for believing the charges unauthorized it tends only to increase expense and trouble needlessly to take exceptions. And, if contestants desire a reference on these matters they may have it upon peril of payment of costs, if their exceptions are not sustained.

The material exception in the case is that one which denies that the administrator is entitled to any compensation for services rendered Mrs. Martin in her life time. It is not denied that such services were rendered, nor that they were of great value to Mrs. Martin. Indeed, the overwhelming weight of the evidence is that Dr. Wood, for more than twenty years, managed the business of Mrs. Martin, with fidelity, tact and success; that during most of this time he attended herself and family as a physician, and that her means greatly increased under his management.

These facts are shown by the evidence of their neighbors, and by the repeated declarations of Mrs. Martin, down to the time of her death. She was aunt to Dr. Wood, living some twelve miles distant from him, and for the purpose of having the benefit of his advice and assistance, being a widow without children, about twenty years before her death she removed to a farm, which she owned or

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bought, within one mile of the residence of Dr. Wood.

As before stated, it is not controverted that Dr. Wood rendered Mrs. Martin valuable services in the management of her plantation and negroes, the sale of her crops; taking charge also of her surplus money and loaning it out upon good personal or real estate security, renewing and collecting notes, etc.

But it is insisted that these services were rendered gratuitously, and that Dr. Wood did not intend to charge, nor did Mrs. Martin expect or intend to pay for them. A great deal of testimony has been taken on this point, and while two witnesses say that some time during the term of his services he said he did not expect to receive anything for his services, and that he did not intend to charge anything for his services, the weight of evidence is, that he always expected to receive and intended to claim compensation. On several occasions Mrs. Martin, in his presence, declared that Dr. Wood was devoting a great deal of his time to her business; that he had managed it most faithfully and successfully, and that she would compensate him for it, adding on some occasions, at her death. Often to others, in the absence of Dr. Wood, she made similar declarations, saying she could not do without his services, and she would pay him well for them. So that we are of opinion that there was an understanding between the parties that Dr. Wood was to be compensated for his services.

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Probably Mrs. Martin intended to provide this compensation by her will, but dying suddenly she failed to carry out her purpose. When a party renders service in hope of a legacy, in sole reliance upon testator's generosity, without any contract express or implied, no action will lie, if no provision be made by will. But where, from all the circumstances, it is manifest that it was mutually understood that compensation should be made by will, and none is made, an action lies to recover the value of such services: 13 Wend., 460, 9 Grat., 708.

We think the circumstances of this case, as well as the repeated declarations of the parties, show that both Dr. Wood and Mrs. Martin understood that compensation was to be made for the services rendered by Wood, at the death of Mrs. Martin.

Although she had often spoken of her intention to reward Dr. Wood, Mrs. Martin, although abundantly able to do so, never made any offer of present compensation, but always spoke of it as to be made in the future, and sometimes, as at her death.

But it is said that Dr. Wood in loaning her money exacted from the borrowers, not only the highest rates of legal interest for Mrs. Martin, but also stipulated for an annual bonus for himself of 3 to 5 per cent., to be paid by the borrower as compensation for his trouble in getting up the money and taking deeds of trust, investigating

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titles to the lands upon which trust deeds were taken, etc. This, it is said, was sufficient pay for his services in respect to the management and loan of the money, and that if allowed compensation he should account for the sums thus received. Several instances are shown in which he did charge and receive such compensation. But, although he said it was his custom to charge in all such cases, several cases are shown in which he did not make such charge.

The payment was always made by the borrower, Mrs. Martin got all the interest she was entitled to, and her interest was always protected. And there is evidence that she knew of this practice of Dr. Wood and made no objection to it, and her ratification of his act may be thus presumed. We are of opinion, therefore, that the administrator cannot be held liable for any sum thus received in discharge of a debt due him from the estate. The evidence shows that Dr. Wood's services were worth \$450 per annum, and the Chancellor allowed this sum for a period of seven years. But the contestants have relied upon, and pleaded the statute of limitations two and a half and six years, and we are of opinion that the plea is a good defense against the recovery for more than six years' service. For this term of six years defendant is entitled to compensation with interest at the end of each year to the present time exclusive of the time from intestate's death until six months after the grant of regular administration on her estate. De-

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tendant will be entitled also to 5 per cent. commissions on the amount of the fund passing through his hand, and in this will be computed the debts secured on mortgages or deeds of trust, but his exception for insufficiency of five per cent. allowance, in this particular, will be overruled. And except as modified by this opinion the exceptions to report will be overruled, and the Chancellor's decree will be affirmed, and the cause will be remanded to the Chancery Court for such further orders and decrees as may be necessary to a final adjustment of the rights and equities of the parties.

The costs of this Court will be paid by the administrator out of funds of the estate in his hands, and the costs below will be paid as the Chancellor may direct.

 Thurston v. University of North Carolina.

 A. J. D. THURSTON et al. v. UNIVERSITY OF NORTH
CAROLINA.

 4L 513
10L 203
11L 561
12L 19

ADVERSE POSSESSION. *Assurance of title.* A partition of specific lands, under a general devise by will of all the residue of the testator's estate, real and personal, made in writing by persons especially authorized by the will, is an assurance of title, within the Code, sec. 2763, which will vest the parties with a good title to their allotments by adverse possession for the time prescribed.

 FROM GIBSON.

Appeal from the Chancery Court at Humboldt.
JOHN SOMERS, Ch.

A. W. CAMPBELL and JONES & CARTEL for Com-
plainants.

H. T. JOHNSON and S. W. COCHRAN for Defend-
ants.

COOPER, J., delivered the opinion of the Court.

The University of North Carolina, on the 26th of May, 1869, brought an action of ejectment against the complainants for the land in controversy.

On the 13th of March, 1872, this bill was filed to set up a supposed lost deed for the land from

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the University to Samuel Dickens, under whom the complainants claim, to have the right of the complainants to the land declared, and to perpetually enjoin the action at law.

On final hearing, the Chancellor gave a decree in favor of the complainants, and the defendant appealed.

Prior to the year 1824, the State of Tennessee, on warrants of the State of North Carolina, had granted to the University of North Carolina, many thousand acres of land, in separate grants, in the district of West Tennessee. Among other grants was a grant dated the 9th of October, 1821, for 640 acres in the 10th District, Range 2, Section 11 of Gibson County. The University had employed Samuel Dickens to take charge of the location of the warrants and sale of the lands, and prior to the year 1835 he seems to have sold and satisfactorily accounted for lands to the value of nearly \$200,000.

In 1835, the University appointed Charles Manly and Samuel Dickens its agents and attorneys in fact to sell the residue of said lands, and it appears from a report of Charles Manly to the University, which is made an exhibit to the answer, that these agents did sell the residue of said lands on or before the 21st of November, 1835. This report shows that Manly was authorized to ascertain "the tracts of land sold and those remaining to be sold," and to make a settlement with Samuel Dickens, and that he did make the settlement and

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ascertain and report the lands unsold, which were afterwards sold under the power. The tract of 640 acres above mentioned is not included in the list of unsold lands. The land in controversy constitutes a part of the land covered by this grant.

In the year 1840 Dickens died, leaving a will which was admitted to probate in September of that year. By that will, after making certain specific devises and legacies, he directs, "all the residue of his lands and real estate" to be equally divided between his children, they accounting for advancements, and he appointed three persons by name "to make all and every necessary division pursuant to the will," and provided that "their acts and doings, or the acts and doings of either two of them," should be binding on all parties concerned. In pursuance of the will, the parties themselves agreed upon a division of the lands in writing, by which the 640 acre tract of land, granted as above and treated as a part of the estate of Samuel Dickens, was allotted to Elizabeth R. Belote, one of his daughters. The testator had, by his will, appointed trustees to hold the lands devised to this daughter in trust for her "and her children present and future." Two of the persons authorized by the will to make the partition of the testator's lands, on the 25th of December, 1841, ratified and confirmed the partition agreed upon by the heirs, the share of Elizabeth R. Belote being given to the trustees named by

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the will, "in trust for the use and support of Elizabeth R. Belote and her children."

The partition thus made was acknowledged by the two Commissioners who had made it under the powers conferred by the will, and registered in several counties in West Tennessee, in which some of the lands lay, though not, it seems, in Gibson County.

Mrs. Belote went immediately into possession of the land by a tenant, who, as early as 1842, built a house upon a part of the land, and resided therein, and cultivated the cleared land, consisting of from fifteen to thirty acres, continuously for seven or eight years. He was succeeded without interruption of possession by other tenants from year to year for several years.

The testimony leaves no doubt that from 1842 to 1852, inclusive, the land was continuously occupied by a succession of tenants holding under Mrs. Belote and her children, the land being known as the Belote land. There is evidence tending to show the continuous occupation of the same cleared land under the Belote children and those deriving title from them, down to the commencement of the action of ejectment, but there is more conflict in the testimony for the subsequent years, and the possession as proved would not have the importance of prior possession, by reason of a new partition of the land among the Belote children. This partition was made on the 15th of September, 1852, by dividing the land into three

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tracts, the improvements and cleared land being embraced in only one of these tracts.

The complainants claim two of these allotments under the children, to whom the allotments were made.

The fact that the agent of the University reported that he had ascertained in 1835 all the lands belonging to the University which remained unsold, and had sold the same, giving a detailed list of the lands, which did not include the tract in controversy, and the further fact that the tract was known as the Dickens land in the life time of Dickens, are persuasive of the truth of the complainants' theory that Dickens held the land by a deed from the University, which has been lost.

The report of Manly shows what might well be presumed, that the University had a list of all its warrants and grants, and if the grant of the land in controversy, or the warrant on which it was based, had been placed in the hands of Dickens and never accounted for, the fact could readily have been established. Conceding, however, that there is not sufficient in this record to prove that there ever was a conveyance from the University to Dickens, the rights of the parties turn upon the question whether the title of the University has been divested by the continuous adverse possession of the land by those under whom the complainants claim for the period, and under an assurance of title sufficient to produce that result under our statute of limitations.

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By the Code, sec. 2763: "Any person having had, by himself or those through whom he claims, seven years' adverse possession of any lands, tenements or hereditaments, granted by this State or the State of North Carolina, holding by conveyance, devise, grant or other assurance of title, purporting to convey an estate in fee, without any claim by action, at law or in equity, commenced within that time and effectually prosecuted against him, is vested with a good and indefeasible title in fee to the land described in his assurance of title."

If the will of Dickens had expressly designated the land in controversy, and devised it in fee as part of his estate, the devise would, by the very words of the section, have been an assurance of title sufficient to vest an indefeasible title, by an adverse possession of seven years: *Cox v. Peck*, 3 Yer., 435. The possession of any part of the land for the requisite period, under a sufficient assurance of title, gives an indefeasible title to the extent of the boundaries therein named. And, since 1784, it has been provided by statute that every devise shall convey the entire estate of the testator in the lands unless the contrary intent plainly appears from the words and context of the will: Code, sec. 2164.

A devise of all the testator's lands, or of the residue of his lands would be good without naming them: *Williams v. Williams*, 10 Yer., 20 *Countess of Bridgewater v. Bolton*, 1 Salk., 236; *Jackson v.*

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Delany, 11 Johns., 365. Such a devise would carry a possessory estate: *Marr v. Gilliam*, 1 Cold., 488, *Baker v. Hale*, 6 Bax., 50.

The will unquestionably gives to Elizabeth R. Belote and her children, or rather the trustees who hold for them, the fee in the land devised for the benefit of the daughter and her children. The partition, which purports to be made in accordance with and under the power conferred by the will, must be held to pass the same interest.

A decree of a competent Court for partition is an assurance of title within the meaning of the statute: *Duncan v. Gibbs*, 1 Yer., 236. Even if it do not divest and vest title: *Johnson v. Britt*, 9 Heis., 756. The reason is, however, that the parties hold their parcels in severalty by the same title that they held the land in common.

A deed or agreement for partition voluntarily entered into by the parties would be equally efficacious for the same reason, although it did not in legal terms vest each parcener with a fee.

The question before us, then, is narrowed down to this: does a partition of specific lands among devisees, made under a will, which gives each devisee a fee in the lands devised, constitute an assurance of title, under the statute, to the lands mentioned therein, although the testator had, in fact, no title; or, at most a mere possessory title to the land?

A Sheriff's deed, founded on a void tax sale, is such an assurance of title: *Love v. Shields*, 3 Yer.,

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405. So is a deed void, and inoperative in its inception: *Vance v. Johnson*, 10 Hum., 214; *Hunter v. O'Neal*, 4 Bax., 494. So is a deed founded on a void decree: *Whiteside v. Singleton*, Meigs, 224. So is a fraudulent deed: *Gray v. Darby, M. & Y.*, 396; *Clark v. Chase*, 5 Sneed, 636. Whether fraudulent in law or fact: *Blantire v. Whitaker*, 11 Hum., 313. So, says Judge Caruthers, is a forged deed: 5 Sneed, 638. And it is not necessary that the deed should be registered: *Stewart v. Harris*, 2 Swan, 656. Continuous adverse possession is the important point, the written instrument, purporting to convey an estate in fee, being necessary to fix the extent of the land to which the title may thus be acquired.

There is nothing to impugn the good faith of the parties in this case. The land was, beyond doubt, supposed by the devisees, and the persons empowered by the will to make the partition, to belong to the testator. Whether it did in fact belong to him by any assurance of title cannot now be shown. The instrument of partition is neither forged nor fraudulent. Even if inoperative in its inception, or founded on a will ineffective as to the land in controversy, it, when taken in connection with the will, purported to convey an estate in fee. No reason occurs why it should not be as effective to fix boundaries as the other instruments mentioned, equally invalid and far more objectionable in morals.

The defendant has slept upon its rights, until

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innocent parties have become interested, and may justly claim the benefit of the law. The objection to the introduction of the copy of the instrument of partition of 1841 as evidence is not well taken. The loss of the original is shown, and it was competent to prove its contents by the next best evidence.

The probate was sufficient to authorize its registration in any county in which any part of the lands lay, and it was so registered in several counties. A certified copy of the instrument as thus properly registered was the best evidence of its contents.

There is no error in the Chancellor's decree, and it must be affirmed, with costs.

McKnight v. Hughes.

JAMES MCKNIGHT v. JAMES E. HUGHES et al.

EXECUTION. Lien. *How enforced on land after levy ; debtor dying before sale :* When a lien has been fixed upon land by the levy of an execution or attachment and the debtor dies before a valid sale, the heirs have the right to demand a revivor against the personal representative and exhaustion of personal assets, before the lien can be enforced by a sale of the land.

Cases cited: *Green v. Shaver*, 3 Hum., 139; *Perkins v. Norvell*, 6 Hum., 151; *Stockard v. Pinkard*, *Ibid*, 119.

FROM MADISON.

Appeal from the Chancery Court at Jackson.
H. W. McCORRY, J.

McFARLAND & BOBBITT and J. L. H. TOMLIN for
Complainant.

CARUTHERS & MALLORY for Defendant.

McFARLAND, J., delivered the opinion of the
Court.

The substantial allegations of the bill are as follows: In May, 1870, James B. Percy recovered a judgment in the Circuit Court of Madison County against James Hughes, the ancestor of the defendant herein and another, for \$716 and costs. An alias execution issued on this judgment to Dyer County and was levied on the two tracts of land, of 5000 acres each, belonging to said Hughes. The lands were advertised and sold, both tracts

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together, and purchased by said Percy, the plaintiff in the execution, for the amount of the judgment and costs, and the Sheriff gave to Percy a certificate of the purchase dated the 24th of September, 1870. Percy assigned said certificate to W. L. Stephens, on the 15th of April, 1873, and in the same month the Sheriff made to Stephens a deed of the land. On the 20th of September, 1875, Stephens assigned both the certificate and deed to the complainant, McKnight, the form of the assignment being simply: "For value received I assign the within certificate" and "my interest in the within deed," etc. Previous to the assignments and previous to the assignment by Percy to Stephens before the date of the deed, to-wit: on the 16th of October, 1872, the present defendants, the heirs of said James Hughes (who had died) filed their bill in equity against said Percy to set aside the sale of said land, upon the ground, among others, that the two tracts were sold together instead of separately.

The cause was finally decided by the Arbitration Court in favor of the complainants in the cause so far as to set aside said sale, but declaring that the judgment aforesaid and levy of said execution constituted a valid lien on the land which might be enforced, that said James Hughes was insolvent except his lands, and that his estate had been settled years ago. The bill was filed on the 29th of December, 1875, and prays that the lien of the execution levy aforesaid be en-

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forced and the land sold for the complainant's benefit. No steps seem to have been taken for some time, owing, probably, to the loss of the papers. The bill charges that some of the defendants are infants, and two (husband and wife), are non-residents. A guardian *ad litem* was appointed for one of the infant defendants; a demurrer was filed in her behalf, upon the hearing of which the Chancellor dismissed the entire bill, notwithstanding a judgment *pro confesso* had been taken against the others.

The first objection taken in the demurrer is, that the complainant does not show himself to be the owner of the judgment in favor of Percy sought to be revived.

It is true the grounds upon which he claims are the assignments of the Sheriff's certificate of the sale and the Sheriff's deed, made in reality long after the bill of the present defendants had been filed to declare said certificate and deed void, whether the decree declaring them void had been rendered at the date of the assignments to complainants does not appear. The bill, however, charges that these assignments were intended to give complainants the benefit of the judgment and all rights to which said Percy and Stevens were entitled, and as our statute (Code, secs. 2990, 2996) authorizes the satisfaction of judgments in cases where the title to the property fails to be set aside for the benefit of the purchaser, and as the complainant may be regarded as standing in the

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shoes of the purchaser, we hold the allegations of the bill on this point sufficient.

The second objection is that our statutes only allow the setting aside of the satisfaction and the reversing of the judgment in such cases, but make no provision for reviving the *lien of the execution*. However this question may be, the allegations of the present bill are that it was adjudged in the former cause in which the present defendants were complainants that the levy of said execution was a valid lien which might be enforced.

This being, according to the allegations of the bill, a valid adjudication, we see no reason why a new bill may not be maintained to enforce the lien then adjudged to exist.

But the third and most serious objection to the bill is that no steps have been taken to revive the judgment against the administrator and show an exhaustion of the personal estate, and the administrator is not a party to the present bill. Our authorities hold that where a lien has been fixed upon land by the levy of an execution or attachment and the debtor dies before a valid sale the heirs have the right to demand a revivor against the personal representative and exhaustion of personal assets before the lien can be enforced by a sale of the land. See *Green v. Shaver*, 3 Hum., 139; *Perkins v. Norvell*, 6 Hum., 151; *Stockard v. Pinkard*, *Ibid*, 119.

This ground of demurrer is therefore well taken. It is too late to amend in this particular, as the

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bill shows that all steps against the administrator would now be barred by the statute of limitations. The decree therefore dismissing the bill as to the defendant in whose favor the demurrer was filed must be affirmed.

But it was error to dismiss the bill as to the defendants, who made no defense. While the defendants had the right to insist upon the exhaustion of the personal estate, and for that purpose a revivor against the administrator, they might waive the defense by a failure to take the objection. If they fail to take the objection and the bill be taken for confessed, it does show a valid lien on the land which may be enforced. The complainant was therefore entitled to a decree against the adult resident defendants upon the *pro confesso* for a sale of the share of the land for their *pro rata* of the judgment.

But as to the non-resident defendants the judgment *pro confesso* did not entitle the complainant to a decree without evidence, this being a case without attachment of property: Code, secs. 4371, 4373.

As to the defendants charged in the bill to be infants it was irregular to proceed against them without a guardian: Code, sec. 4372. The judgment *pro confesso* was probably taken upon the assumption that all but the one defendant had attained their majority since the bill was filed. But there is nothing of record to show this, except an affidavit of the complainant's solicitor, made

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for the purpose of supplying the lost papers, in which he says that he was *informed* that all but one had arrived at age. This was not sufficient, and besides it was made after the judgment *pro confesso* was taken. The decree as to the one defendant will be affirmed; as to the others, it will be reversed, and the cause remanded, to the end that complainant may proceed regularly against the other infant defendants, either by having guardians appointed to defend for them, or by taking such steps as will require them to defend as adults; and the complainant may also proceed to make out his cause against the non-residents.

As to the adult resident defendants against whom judgment *pro confesso* has been regularly taken the complainants right to a decree final upon the principle before indicated, will be declared, but not enforced until the cause is brought to a hearing as to the others.

The costs of the Court will be adjudged one-half against the complainants, the other half against the adult resident defendants.

Duval v. Brady.

E. G. DUVAL et al. v. M. B. BRADY et al.

SUPREME COURT PRACTICE. *Mistake.* The alleged mistake of the Clerk of the inferior Court, omitting the names of some of the appellants as parties in an appeal bond, cannot be corrected in the Supreme Court after disposition of the appeal. The Court might, in the original cause, before final determination, have granted permission to amend a defective bond, and complainants also had their remedy by writ of error, but such mistake cannot be the object of a new bill.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

H. CRAFT for Complainants.

J. M. GREGORY and T. B. MICOU for Defendants.

McFARLAND, J., delivered the opinion of the Court.

Two bills were filed in the Chancery Court at Memphis, by creditors of the firm of Norvell, Boone & Co., to set aside a conveyance made by William McKeon, a member of said firm, for the benefit of his wife and children, and to subject the property conveyed to the satisfaction of the claims of the several complainants.

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The complainants and defendants in the present bill were complainants in either one or the other of said two first named bills, or became so by petition, they claiming to be separate creditors of said firm. Said causes were consolidated and heard together and the bills dismissed by the Chancellor.

Upon a hearing in this Court upon appeal, at the April Term, 1879, the decree of the Chancellor was reversed, the conveyance declared to be fraudulent, and the same set aside; and the property was ordered to be sold to satisfy the claims of the complainants in said causes; but it was further held that only three of the several complainants in said causes had presented their appeals from the decree of the Chancellor. All had prayed an appeal, but according to the holding of this Court, only three had complied with the conditions upon which the appeal was granted, by executing appeal bonds, and accordingly the decree of this Court was only in favor of the three appellants.

Subsequently, the present bill was filed by the complainants in the first named bills, who were held not to have appealed against the three who obtained the benefit of the appeal, for the purpose of having a *pro rata* distribution of the property recovered, or its proceeds. .

The bill is predicated upon two grounds: 1st, That the firm of Norvell, Boone & Co., as well as the estate of W. McKeon, being insolvent, the recovery will enure to the benefit of all the cred-

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itors of said estate, whether parties to the cause or not. In support of this position, we are cited to the case of *Rains v. Rainey*, 11 Hum., 261. That case does hold that where the estate of an intestate is being administered under the insolvent laws, and one creditor alone sues for and recovers the proceeds of property fraudulently conveyed by the intestate, that the other creditors may compel a *pro rata* distribution of the recovery, less the costs and expenses. The principle of that case cannot be applied here, because it is not charged that the insolvency of the estate of William McKeon was ever suggested, or any steps taken to administer it as an insolvent estate. Nor is the personal representative of said McKeon made a party to the present bill. Further, the decree of the Chancellor in the first named causes dismissing the bill without even a judgment for the debts, remains in full force as to the present complainants. This decree was rendered in 1872.

The second ground of the present bill is, that the failure to execute the proper appeal bonds in the first named causes, was owing to the mistake of the Clerk who prepared the bonds in omitting the names of the present complainants as parties thereto.

We think it clear that such a mistake cannot be corrected in this mode. This Court might in the original causes have granted permission to amend or supply a defective bond, and the complainants also had their remedy by writ of error,

Harrison v. Guion.

but we do not perceive how the mistake or oversight can be the subject of a new bill.

It is further earnestly argued that the decision of this Court, denying to the present complainants the benefit of the appeal in the original causes, was erroneous. However this may be, it was at all events deliberately adjudged, and the error, if one, cannot now be corrected.

The decree of the Chancellor, dismissing the bill, must be affirmed with costs.

SOPHY G. HARRISON et al. v. ANNIE E. GUION et al.

CHANCERY JURISDICTION. *Will. Devisavit vel non.* The Chancery Court has no jurisdiction to try an issue of *devisavit vel non*; the jurisdiction of the Circuit Court is exclusive.

Cases cited: *Smith v. Harrison*, 2 Heis., 230; Code, secs. 2173, 4201, 4227.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

Harrison v. Guion.

T. W. BROWN for Complainants.

C. F. VANCE and CLAPP & BEARD for Defendants.

W. C. FOLKES, Sp. J., delivered the opinion of the Court.

This bill is filed on the theory that the estate of John Smith, who died in Memphis in 1851, had been used by the defendant, Annie E. Guion, and her sister, Lucretia H. Smith, (now dead), in the purchase and improvement of nine acres of land on Adams street, in the city of Memphis.

There never has been an administration upon the estate of John Smith.

Complainants filed this bill as distributees of John Smith's estate, and insist:

1st, That the funds of John Smith should be followed into said land in Memphis, and charged upon it as a trust in favor of complainants.

2nd, That defendants should be made to account for personal property, or the proceeds thereof, belonging to John Smith which came to the hands of defendant, Annie Guion, and her sister, Lucretia Smith.

The bill likewise recites the death in 1870 of Climoe H. Smith, wife of John Smith, and the mother of complainants, and defendant, Annie Guion, and charges that her will, which is exhibited with the bill, was procured by defendant, Annie E., and her sister, Lucretia H. Smith, by fraud,

Harrison v. Gulon.

undue influence and imposition upon their mother, who was very aged and infirm at the time of her death, and asks an issue of *devisavit vel non* thereon.

The bill further states the death of Lucretia H. Smith in 1871, and charges that her will, in which she bequeaths all of her estate, (which, so far as this record discloses it, at the time of her death, consisted only of an undivided half interest in so much of the nine acres of Memphis property as remained unsold), to her sister, Annie E., was also procured by undue influence, imposition and fraud practiced upon the testatrix by defendant, Annie E. Guion.

The bill also attacks the testamentary capacity of said Lucretia H. Smith.

Without undertaking to review the evidence in the record, which is very voluminous, it is sufficient to say that after a very careful examination of it, we are of opinion that complainants wholly fail to make out their case. This conclusion renders it unnecessary to refer to the authorities discussed in the argument of counsel.

The Court below took the same view of this case, and dismissed the bill, so far as it sought to establish a trust in or upon the land in question, or so far as it sought an account with defendants as to any personal property of their common ancestor wrongfully received or converted by them.

We affirm so much of the Chancellor's decree.

The Chancellor, however, awarded an issue of *devisavit vel non* as to Lucretia H. Smith's will, at

Harrison v. Guion.

the trial of which, the pleadings and proof in this cause may be used, together with such other proof as either party may introduce. From this portion of the decree the defendants appealed.

We think the Chancellor is in error as to this part of his decree.

Section 4201 of the Code gives to the County Court original jurisdiction in the probate of wills, while Section 2173, as to "contesting will," provides that "where the validity of any last will or testament, written or nuncupative, is contested, the County Court shall cause the fact to be certified to the *Circuit Court*, and send to said Court the original will, and shall require the contestants to enter into bond," etc.

Section 4227, under the head of "jurisdiction and powers of Circuit Courts," provides that "They have *exclusive* jurisdiction to try and determine all issues made up to contest the validity of last wills and testaments."

This question was presented in *Smith v. Harrison*, 2 Heis., 230, 241, where the Court say: "we cannot, and do not, undertake to decide upon the validity of the will as a testamentary paper."

The Chancery Court has no jurisdiction to try such an issue. The jurisdiction of the Circuit Court is exclusive.

We therefore reverse so much of the decree of the Chancellor as awards an issue of *devisavit vel non*, and, making such a decree as should have been made below, direct the entire bill to be dis-

Roy v. Giles.

missed at the cost of complainants. This dismissal is, of course, without prejudice to the rights of complainants to contest the validity of the will in the proper form.

A. L. ROY et al. v. THOMAS L. GILES et al.

JURISDICTION. *Probate Court, Shelby County:* This Court has only such jurisdiction (T. & S. Cole, sec. 316h) as to guardian settlements, as was previously conferred upon the County Court.

COUNTY COURT. Jurisdiction. After a final settlement and resignation of a guardian the County Court could not entertain a bill, filed in accordance with the forms and practice of a Chancery Court, to surcharge and falsify the settlement. For this purpose resort should be had to a Court of Chancery. County Courts have power to bring guardians to settlement, but for this purpose the remedy is summary and not by a bill according to the forms of Chancery.

FROM SHELBY.

Appeal from the Probate Court of Shelby County.
J. E. R. RAY, J.

J. R. & W. S. FLIPPIN for Complainants.

Roy v. Giles.

J. A. TAYLOR for Defendants.

McFARLAND, J., delivered the opinion of the Court.

This bill was filed in the Probate Court of Shelby county against the two former guardians of Mrs. Roy (Giles and Shelly), and their sureties for an account and settlement of their guardianships.

It is charged that Giles made his settlement in 1867, and resigned. It is sought to surcharge and falsify this settlement. Shelly was appointed soon after the resignation of Giles. The allegations of the bill are indefinite as to his settlement. "A report and settlement" made by him is referred to in the bill.

The principal charge against him, however, is that a tract of 76 acres of land belonging to Mrs. Roy and three others, was sold by a decree of said Probate Court for partition, in a cause which is referred to as pending in said Court; that Mrs. Roy was entitled to one-fourth of the purchase money, the whole sum being \$1,368.06.

They suppose it has been paid, but what became of it they do not know, but they charge that it come, or should have come to the hands of Shelly as guardian, none of which has been accounted for, Mrs. Roy only having received about \$160 out of the funds of her estate.

The Judge overruled a demurrer but allowed an appeal. The question presented in argument is

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whether the Court has jurisdiction of the cause. The act creating the court defines its jurisdiction as follows: The said Court shall have original jurisdiction of all matters of probate, the administration of estates and orphans' business, embracing all of the subjects and power enumerated in and conferred by sections 4201, 4203, 4204, 4205 and 4208 of the Code of Tennessee, and concurrent jurisdiction with the Chancery courts of Shelby County over the persons and estates of idiots, lunatics and other persons of unsound mind; and proceedings for the partition or sale of estates by personal representatives, guardians, heirs, tenants in common, joint owners or coparceners, for the sale of lands at the instance of the creditors of decedents if the personal property is insufficient to satisfy the debts of the estate, and for the allotments of dower, and it is hereby vested with all the powers of a Chancery Court, touching these matters: T. & S. Code, sec. 316h.

This not being a cause involving the person or estate of an idiot, or person of unsound mind, or for the partition or sale of real estate for any purpose, or the allotment of dower, we must look to the first clause of that part of the act above quoted as the authority for the jurisdiction. This, however, only gives such jurisdiction as was previously conferred upon the County Court. The sections of the Code referred to, being those conferring or defining the jurisdiction of the County Court.

Roy v. Giles.

While it is clear that the County Court, and consequently the Probate Court, had jurisdiction of the settlements of guardians, yet we suppose that after a final settlement and resignation of a guardian, the County Court could not entertain a bill filed in accordance with the forms and practice of a Chancery Court to surcharge and falsify the settlement. For this purpose resort should be had to a court of chancery. While the jurisdiction of the County Court in the first instance is original, yet that jurisdiction is exhausted upon the final settlement and acceptance of the guardian's resignation, and no statute confers jurisdiction to entertain a bill for the review of the proceedings. The cases of *Young v. Shumate*, 3 Sneed, 369, *Bond v. Clay*, 2 Head, 369, recognize the general rule.

We hold, therefore, the Court had no jurisdiction, especially as to the defendants, Giles and his sureties. The Court had the power to bring Shelly to a settlement, but for this purpose the remedy was summary and not by a bill in the present forms.

The decree will be reversed and the bill dismissed with costs.

 Jones v. Ragland.

 JT 7890
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R. B. JONES v. H. RAGLAND et al.

ASSIGNMENT. *Real estate. Vendor's lien. Priority.* A trust assignment of land for the benefit of a creditor, duly registered, made by a devisee of the land to secure a debt of the testator renewed by the executor will have preference over a vendor's lien for unpaid purchase money resting in parol, the legal title to the land being in the devisee, and the assignees having no notice of the lien until after the deed was accepted.

 FROM SHELBY.

Appeal from the Chancery Court at Memphis.
 W. W. McDOWELL, Ch.

TAYLOR & CARROLL for Complainant.

J. R. & W. S. FLIPPIN for Defendants.

COOPER, J., delivered the opinion of the Court.

Bill filed on the 7th of December, 1877, subsequently amended, and is before us upon demurrer to the bill as amended. James C. Jones, the father of complainant, and R. C. Brinkley, at some time prior to 1859, in which year Jones died, entered into a partnership arrangement for building the Memphis and Germantown plank road. Brinkley furnished the capital and Jones his services, with the agreement that the profits and losses should be equally shared between them. At the

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completion of the work they had realized as profits of the enterprise a certain tract of land described.

Upon settlement of the business it was agreed that Jones was entitled to one undivided half of the land and Brinkley to the other half, the legal title to the whole tract being in Jones. Complainant, then a child of three or four years of age, had been named after Brinkley. For this reason, Brinkley felt an interest in complainant, and proposed to give him the benefit of his interest in the land. By consent of Brinkley, Jones agreed to pay complainant, in place of the land, the sum of \$10,000, and executed his note therefor, payable to the complainant when he should come of age, and placed the same in the hands of Brinkley with the express understanding and agreement that there should be a lien on the land for the payment thereof. The note was immediately handed back by Brinkley to Jones, to be held by him for complainant, as his father and natural protector. The father accepted the trust and kept the note until just before his death, in 1859, when he destroyed it. He did no act indicating any

other purpose, than to perform the trust until a short time prior to his death, when he made his will. By said will, he devised and bequeathed all his property, real and personal, to his widow, Sarah W. Jones, without any reservation in favor of complainant. The said Sarah W. Jones knew, before the death of her husband, all the facts in

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relation to complainant's claim. Nevertheless, she sold, afterwards, to innocent purchasers, a part of the land, and on the 11th of July, 1874, executed to defendant, Hearn, a trust conveyance of another portion of the land to secure a debt of the husband, renewed by her as executrix of his will, in favor of the defendant, Ragland. She had since died, in April, 1876, after devising her property to complainant and Felix M. Jones, his only brother. This bill was filed to enjoin a sale under this trust deed, upon an advertisement of the land for sale by the trustee, the bill stating that the complainant had, only within a few days, been advised of his rights. The demurrer raises the question whether the facts create a trust or lien, which equity will enforce as against the beneficiary in the trust assignment.

The argument submitted in this case is addressed to the question whether a trust in land can, in this State, be created and evidenced by parol. But the facts raise no such question. They are, in substance, that Brinkley sold his undivided interest in the land to Jones in consideration of \$10,000, to be secured by the purchaser's note, made payable to the complainant, and a lien upon the land.

In that view, conceding complainant's right to the lien, it would be the ordinary case of a sale of land where the vendor has conveyed to the vendee the legal title, and the purchase money is unpaid. In such a case, the vendee giving simply

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his own note for the purchase money, there would be no waiver of the vendor's lien or equity on the land for the security of the debt.

This lien was at one time a favorite with our courts, and repeatedly recognized and enforced from *Kennedy v. Woolfolk*, 3 Hayw., 195, to *Brown v. Vanlier*, 7 Hum., 239, not only against the vendee and his heirs, but also against all persons claiming under him with notice of the vendor's equity : *Eskridge v. McClure*, 2 Yer., 84. In *Brown v. Vanlier*, the lien or equity was held to be superior to the right of a trustee and beneficiaries under a general assignment of the vendee for the benefit of creditors, where the vendor filed his bill for the enforcement thereof before the trust deed was executed. In *Green v. Demoss*, 10 Hum., 371, the ruling was qualified by construing it as merely giving the priority where the bill was filed before the trust deed was accepted by the beneficiaries.

This was an unwarranted construction of the opinion, as is clearly shown by *Deaderick, C. J.*, in *Washington v. Ryan*, 5 Bax., 628. Nevertheless, the subsequent rulings of the Court have been still more against the vendor's lien. In *Fain v. Inman*, 6 Heis., 5, the lien became, "if not quite a myth," only a "floating equity" or "capacity to acquire a lien," and was made to give way to the right acquired under a trust assignment of the vendee to secure a creditor, although the creditor had, before the execution of the trust assignment, full knowledge that the purchase money due the

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vendor had not been fully paid. The Court is of opinion that the later decisions are more nearly in accord with the policy of our registration laws, and adheres to them. My own inclination, in which Judge Freeman concurs, would be otherwise.

The present bill does not show that the trustee and beneficiaries, made defendant, had notice of the complainant's equity. Their right would, under these circumstances, have been good against a positive deed or trust, in writing, given to the complainant but never registered: *Myers v. Ross*, 3 Head., 60. It is, of course, superior to a mere lien or trust, neither reduced to writing nor registered.

The Chancellor's decree must be reversed, the demurrer sustained, and the bill dismissed with costs.

MacI oca v. Panesi.

JOS. MACHECA et al. v. F. PANESI et al.

1. **ATTACHMENT.** *Damages, how awarded for wrongfully suing out.* Defendant in attachment suit, when the attachment has been dismissed, may proceed to recover damages at his discretion, either by motion before the Court that passed upon the original cause or by suit at law upon the bond. It is competent for the Court in which the bond was executed to ascertain and assess the damages. The motion is an independent suit, and is a substitute for an action at law upon the attachment bond.
2. **SUPREME COURT PRACTICE.** *Appeal in suits on bond or motion to award damages in attachment suits.* Appeal from the judgment on motion to assess damages in attachment suits, or from a suit at law upon bond, does not carry to Supreme Court for its revision the judgment or decree in the original cause.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

HUMES & POSTON for Complainants.

R. D. JORDAN for Defendants.

TURNER, J., delivered the opinion of the Court.

The goods of Panesi were attached. On the hearing the Chancellor dismissed the attachment bill as to Panesi. There was no appeal from the decree.

On motion of Panesi, an order of reference was made to ascertain the damages to him because of the attachment.

Macheca v. Panesi.

On the coming in of the report of the Clerk and Master, exceptions were filed by complainants in the original bill, which, being overruled, they have appealed to this Court.

The decree dismissing the bill was final.

Panesi, by his motion, became the actor or plaintiff. The motion is an independent suit, and is a substitute for an action at law upon the attachment bond. The proceedings under it are distinct from the original cause, though growing out of it. The party complaining has his election to proceed, either by motion before the Court that passed upon the original cause, or by suit at law upon the bond.

An appeal from the judgment or decree in either case will not bring up to this Court, for its revision, the judgment or decree in the original cause.

It is competent for the Court in which the bond was executed to ascertain and assess the damages.

The exceptions were properly overruled, and the decree is affirmed.

Winters v. Fleece.

4L 546
8L 504

THOMAS WINTERS v. FLEECE et al.

CONTRACT. *Contractor and sub-contractor.* Under a contract between a contractor for the grading of a railroad, and a sub-contractor of a part of the same work, which stipulated for the retaining, by the contractor, of a certain per centage of the monthly estimates as collateral security for the execution of the contract,* and provided, in the event the sub-contractor failed to keep a sufficient force at work to complete it in time, that the contractor might put a force on said work at his expense, or declare a forfeiture, and re-let or do the work and hold the sub-contractor liable for any damage or injury by reason of his failure, the sub-contractor left the work, and the contractor declared a forfeiture, but neither re-let or did any further work, and, by agreement with the railroad company, abandoned the work, after receiving full pay for what had been done. It was held that the per centage retained belonged to the sub-contractor, and was recoverable accordingly.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

W. M. RANDOLPH for Complainant.

CAMPBELL & JACKSON for Defendants.

COOPER, J., delivered the opinion of the Court.

The defendants were contractors for grading a number of miles of the Mississippi River railroad. The complainant became a sub-contractor for a portion of the same work, the contract stipulating that the defendants should pay the complainant

Winters v. Flecco.

eighty-five per cent. of the monthly estimates of the work done, "the remaining fifteen per cent. to be retained as collateral security for the execution of the contract, until the same is fully executed."

The contract further provided that if it should be found that the work was not progressing with sufficient speed to insure its completion by the time stipulated, the complainant should, upon five days notice, increase his force, and upon failure so to do the defendants might "put a force on said work at his expense, or may declare the same forfeited, and enter upon and take possession of the same, and re-let or do the work, and hold him responsible for any damage or injury to them by said failure to comply with the contract."

The work of grading the road was never completed, because of the failure of the company to pay estimates, and its eventual insolvency. Shortly after the defendants ceased entirely to work on the road, they had a settlement with the railroad company and received payment for the full amount of the work actually done, including the work of the complainant under his sub-contract, and the contract was, by mutual consent, abandoned. The complainant ceased work a month or two earlier than some of the other sub-contractors, but no work was afterwards done on that part of the road included in his contract.

On the 27th of January, 1871, a few months after the work was abandoned, the complainant and defendants had a settlement. Each selected a

Winters v. Fleece.

person to act as an arbitrator or mutual friend in examining the papers and making calculations. These persons found that the account stood thus:

Total estimate. \$9,013.02

Total payments. . . \$7,416.98

15 per cent retained. 1,351.95—8,768.93—244.09

The balance of \$244.09 was afterwards paid by the defendants on the order of the complainant.

This bill was filed for an account, but the litigation is narrowed down to the question whether the complainant is entitled to recover, or the defendant to retain the 15 per cent. of the estimates reserved under the contract, and ascertained to be \$1,351.95 as above.

The Chancellor dismissed the bill and the complainant appealed.

The complainant quit work about the 20th of August, 1870, other contractors leaving off near the same time. The testimony of the engineer of the company leaves no doubt that the work was abandoned because of the failure of the Railroad company to pay estimates.

On the 3rd of September, 1870, the defendants gave the complainant written notice to resume work within five days or they would consider "the same abandoned and forfeited, and will act accordingly, reserving and claiming all our rights in the premises." On the 9th of the same month they served on the complainant the following notice: "Having failed and refused to renew work on your contract, we have no course left but to

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enter upon it and prosecute it, reserving to ourselves all rights incident upon its abandonment and forfeiture." The defendants did not in fact "enter upon and prosecute" the work after this notice. It remained as left by the complainant, and its completion was abandoned by agreement with the company. The notices could only fix rights under the contract, not enlarge them. They terminated the contract, giving the defendants a right to recover expenses or damages under it, incurred in completing the work.

The contract stipulated for the retention of fifteen per cent. of the money earned by complainant, "as collateral security for the execution of the contract."

This reservation was to be of money earned by complainant, and therefore of his money. It was to be retained "as collateral security," that is, not absolutely either as a penalty or liquidated damages, but to secure the completion of the work.

The contract provides the mode in which the work is to be completed, so as to entitle the defendants to indemnity out of the fund, namely, by putting on a force at the complainant's expense, or by declaring the work forfeited and re-letting it, holding the complainant liable for any injury sustained by reason of his failure to comply with the contract. If the work is done or re-let at the original contract price there is no expense or damage under the contract, and the money retained "as collateral security" will belong to the complain-

Winters v. Fleece.

ant. If the work is not continued, and the defendants are released, with their own consent, from their contract to complete it, the money retained as collateral security for a purpose no longer possible, must be the money of the complainant.

The argument on behalf of the defendants is that the fifteen per cent. constitutes liquidated damages for the breach of the contract. Liquidated damages occur where the parties have agreed that, in case one of them shall do, or omit to do a stipulated act, the other shall receive a certain sum as the just, appropriate and conventional amount of the damages sustained by such act or omission: 2 Story, Eq. Jur., sec. 1318. In this case the parties have not agreed upon a certain sum as damages. On the contrary, the contract provides for the retention of a percentage of earnings "as collateral security," and expressly gives the defendants the right to hold the complainant liable for the expense or damages of completing the work, which may exceed the collateral security. It is obvious, moreover, that a percentage of the monthly earnings could never be a "just or appropriate" amount of damages. For, in the early stages of the work, the amount retained might be grossly inadequate, and towards the completion of the contract, grossly excessive.

There is good reason, therefore, why the parties should not have designed that the retainer should constitute liquidated damages, and it is very certain that they have not so provided.

Winters v. Fleece.

The contract itself must give the measure of damages for its breach: *State v. Ward*, 9 Heis., 101. And this contract does clearly define "the expense, damage, or injury" against liability for which the "collateral security" is provided. It is only such expense, damage or injury as may be incurred or sustained in completing the work after breach of the contract, or declaration of forfeiture. No other element of damage is admissible.

In this view the right of the complainant is clear, the defendants having in fact done no work in execution of the contract after they had themselves terminated it by declaring a forfeiture, nor re-let the work, and having agreed with the company to abandon their contract, whereby any further work became impossible, and having received the full amount due for the work actually done. They hold the retained percentage as the money of the complainant, the purpose for which it was pledged as collateral having ceased to exist.

The decree below must be reversed and a decree rendered here in favor of the complainant for the money retained, \$1,351.95, with interest from the 27th of January, 1871, and the costs.

Burr v. Graves.

A. E. BURR et al. v. GRAVES et al.

CHANCERY PRACTICE AND PLEADINGS. *Mechanic's lien. Attachment.* Under a bill filed by a mechanic to enforce his lien for the erection of a building on leasehold property, and the furnishing and erection of machinery and fixtures therein, the attachment may be levied without going on the premises or taking possession of the property.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
W. W. McDOWELL, Ch.

W. D. BEARD for Complainants.

ESTES & ELLETT for Defendants.

COOPER, J., delivered the opinion of the Court.

The contest in this case is between the complainants and the defendant, Richardson, over a steam engine, boilers and other machinery and fixtures located on leased land, and used for carrying on the business of cleaning cotton.

The Chancellor rendered a decree in favor of the complainants, and the defendant appealed.

The complainants, as mechanics, erected the frame building and furnished and put up the engine, boilers,

Burr v. Graves.

machinery and fixtures under a contract with J. R. Miles & Co. The work was accepted on the 10th of June, 1876, the complainants, receiving in payment the notes of Miles, Ely & Co.—one T. S. Ely having in the meantime become a partner. The land had been leased to Miles & Co. for three years from the 1st of April, 1876, the only evidence of the lease being in parol, except a memorandum in writing on the books of the lessor.

On the 15th of March, 1877, the complainants filed their bill to enforce their lien as mechanics on the leasehold interest, building, machinery and fixtures.

The attachment directs the Sheriff to attach the leasehold interest, describing the interest and the land, "together with the buildings, engines, boilers, machinery, etc., on said premises." The levy was made at 11 o'clock A. M., on the 15th of March, 1877, by the Deputy Sheriff in his office without going on the premises or taking possession of any part of the property, by endorsing on the writ, "Levied on all the within described property as herein commanded *instantly*."

The suit was against the members of the firm of Miles, Ely & Co., and such proceedings were had in it that a final decree was rendered in favor of the complainants for the balance of the debt due for the work, and subjecting the property mentioned in the bill to the satisfaction thereof.

On the 12th of July, 1876, Miles, Ely & Co.,

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borrowed from the defendant, Richardson, \$10,000, and to secure the payment thereof, conveyed their said leasehold interest, with the building, machinery and fixtures to a trustee, with power to sell on default.

On the 1st of March, 1877, there having been a default in the payment of the secured debt, the trustee took possession, and on the 15th of March, 1877, sold the trust property under the deed, the defendant, Richardson, becoming the purchaser.

The present bill was filed on the 18th of July, 1877, claiming title under the proceedings in the suit to enforce the mechanic's lien. The defendant, by answer and cross-bill, attacked the validity of the proceedings in the lien suit, and the lien itself, and insisted that the defendant had the better title.

The complainants were, under the original contract, entitled to a lien as mechanics for the debt thereby created, on the leasehold interest in the land, the building, engines, machinery and fixtures furnished and erected, for twelve months from the completion of the work: Code, sec. 1981; *Alley v. Lanier*, 1 Cold., 540. The lease, even if void as a letting for three years, because not in writing, was good for one year, and the bill was filed before the expiration of the year. The lien is enforced by attachment, and will bind the land, although the owner may convey or otherwise dispose of it: Code, secs. 1985, 1987; *Miller v. Mc-*

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Nabb, 4 Sneed, 422. It may also be enforced by judgment and execution at law, to be levied on the property subject to the lien: Act of 1873, 19, 1.

The fact that the notes of Miles, Ely & Co., instead of Miles & Co., with whom the contract was made, were taken, and the further fact that one of the notes fell due after the expiration of the year by reason of the three days of grace, cannot be held to operate as a waiver of the lien, for we have positive testimony that such was not the intention of the parties. Any presumption to the contrary, because of the facts, is clearly rebutted. Whether the acceptance of a note falling due after the expiration of the year, was, to the extent of that part of the debt so evidenced, a waiver of the lien, it becomes unnecessary to enquire.

It is conceded by the complainants that they were not the holders of that note at the filing of this bill to enforce the lien, and that they are, consequently, not entitled to charge it upon the property by virtue of their attachment. One of the other notes had been assigned to an assignee, with notice of the lien, and had been again taken up by the complainants. Their right, as well as the rights of the assignee to the benefit of the lien for this note, if he had taken the proper steps while owning it, cannot admit of doubt: Code, sec. 1989.

The only question of real difficulty in the case

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is whether the levy of the attachment was good as against the defendants. Independent of statute, a leasehold interest in land should be levied on and sold as personal property, and so of the building and fixtures set in and attached to the soil. A mere paper levy without more would not be good: Freeman on Ex., sec. 260. It would be otherwise with a levy on real estate proper: *Id.*, sec. 280. And, when a lien exists, Mr. Freeman treats the levy as a mere form, and this is the result as to a mechanic's lien by the Act of 1878, 19.

Our Code provides that the word "land," whenever used in the compilation, shall be held to include lands, tenements and hereditaments, and all rights thereto and interests therein: Code, sec. 51. The words "real estate" are given by the same section, the like extensive meaning; and, as a consequence, it has been held that a statute which protects the interest of the husband in the real estate of the wife from the husband's creditors, protects a like interest in the wife's leasehold: *Kelley v. Shultz*, 12 Heis., 218.

It had previously been held that the lien given by the Code, sec. 1981, to a mechanic upon the "lot of ground or tract of land" on which improvements were made, extended to the leasehold interest in the lot or land of the person contracting for the work: *Alley v. Lanier*, 1 Cold., 540. And without the aid of the statute, the vendor's implied lien for purchase money has been ex-

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tended to a leasehold interest: *Choate v. Tighe*, 10 Heis., 621. See, to the same effect, *Richardson v. Bowman*, 40 Miss., 788, and *Bratt v. Bratt*, 21 Md., 578.

It is obvious, therefore, that under a statute which gives a lien on land, and is construed to include a leasehold interest, the levy is intended to be uniform for all land, and that the same levy which would be good upon land proper, meaning the entire fee, would be equally good as to any interest in land subject to the like lien enforceable by the like attachment. The statute gives the lien on "the building, fixtures or improvements," as well as the "lot or land," to be enforced by similar attachment: Code, sec. 1985. The levy, which would be good as to the land, must be equally good as to the buildings, fixtures and improvements, at any rate so long as they remain attached to the soil, although severable: *Guthrie v. Jones*, 108 Mass., 191; *Pemberton v. King*, 2 Dev., 376. The statute makes no distinction in the case, and it would not only be a useless refinement for the Court to draw a distinction, but might lead to inconvenient results. The lien is favored by the Legislature, and should not be hazarded by dangerous niceties in its enforcement. It is not so much the attachment as the lien which third persons are required, at their peril, to take notice of. This is rendered plain by the Act of 1873, which actually dispenses with the attachment at law. Any person claiming under the

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original contracting party must stand in his shoes and an attachment good as to the latter ought to be good as the former.

There is no error in the decree of the Chancellor, and it must be affirmed with costs.

4L 558
13L 456

J. D. BREWSTER v. J. S. GALLOWAY et al.

1. TRUSTEE. *Trust fund.* A trustee may assign an order or decree in favor of the trust estate for a valuable consideration, the proceeds of such assignment enuring to the benefit of the trust estate, but he has no power to borrow money for his own use and transfer or assign such orders or decrees as collateral security, and a party who accepts such an assignment cannot be considered either as a legal or equitable assignee.
2. SAME. *Resignation. Res adjudicata.* Upon a petition filed by a trustee to make final settlement and resign, questions which are not directly presented to and passed on by the Court cannot be considered as *res adjudicata*, and the *cestui que trust* is not estopped from denying the correctness of the amount as due to or by him, when such indebtedness was not directly investigated by the Court.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

Brewster v. Galloway.

McFARLAND & GOODWIN for Complainant.

L. W. FINLAY for Defendants.

McFARLAND, J., delivered the opinion of the Court.

The bill alleges that J. J. Murphy was appointed by marriage contract—entered into by the defendants, Galloway and wife, before their marriage—trustee, to hold and manage the estate of Mrs. Galloway, to her sole and separate use; that J. D. Coffee was trustee for his wife, Sallie R. Coffee, who was a sister of Mrs. Galloway, they being granddaughters of William Ruffin, deceased, whose estate was being wound up in the Chancery Court at Memphis. Murphy wishing to resign as trustee, filed his bill in the Chancery Court for a settlement and discharge from his trust.

By a decree rendered on the 26th of March, 1869, upon a settlement between Murphy, trustee, and Coffee, trustee, "the Court finds" that Mrs. Galloway was indebted to Mrs. Coffee in the sum of \$1,422.47 with interest from the 1st of August, 1868, and the sum of \$1,446.58 with interest from the 1st of October, 1868. Murphy was permitted to resign, and Galloway, the husband, appointed trustee, successor of Murphy, and ordered out of the first money coming to his hands, as trustee, to pay said sums to J. D. Coffee.

On the 27th of March, 1869, Galloway and wife, to secure the payment of said sums to Cof-

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fee, executed and delivered to him two orders on Humes & Poston, attorneys at law, directing them to pay said sums to said Coffee out of the funds of Mrs. Galloway, which should come to their hands as her share in the estate of her grandfather, Ruffin, Humes & Poston being the attorneys of Galloway and wife. The orders in addition contained the following, viz: "This claim is a just one for value received, and we hereby make and constitute it a lien upon said remaining interest of Mrs. Galloway in the Ruffin estate." "This claim is also perfectly secured to John D. Coffee, trustee, by provisions of final decree in the case of J. J. Murphy, trustee, v. Mary E. Galloway and others, Chancery Court, No. 2630, and filed March the 24th, 1869.

The foregoing orders were accepted by Humes & Poston subject to their prior lien for fees. On the 3rd of April, 1869, said Coffee assigned said orders to the complainant, Brewster, "guardian," for a valuable consideration, and guaranteed the payment of the same, he (the complainant) being assured by Coffee and Humes & Poston that the share of Mrs. Galloway, to be derived under the decree in the cause involving the settlement of the Ruffin estate, would be largely in excess of the amount of said orders. Complainant filed the orders in the cause referred to, but failed to realize anything, and probably will receive nothing, owing to the disastrous result of the cause so far as the interest of Mrs. Galloway was concerned.

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Upon the foregoing facts the bill assumes that the assignment and delivery of the aforesaid orders by Coffee to the complainant, operated as an equitable assignment of the judgment or decree rendered in favor of said Coffee, trustee, against Mrs. Galloway or her trustee, in the case of *Murphy v. Galloway*, before referred to; and failing to realize the amount upon the orders, complainant has the right to satisfaction out of any of "the trust property" of Mrs. Galloway to be found, and for this purpose makes other allegations and parties not necessary at present to be noticed.

The answer of Galloway and wife sets up as a defense that the settlements between the two trustees, made in the case of *Murphy, trustee, v. Galloway*, were only partial settlements, and by reason of subsequent transactions these results were changed so that there came to be nothing due from Mrs. Galloway's trust to Mrs. Coffee's.

In further explanation of this it should be stated, that while *Murphy* was trustee he sold some of the trustee property, and purchased another lot in or near Memphis, jointly with Coffee, and they erected improvements thereon, intended for a residence for the two families. Out of these expenditures, as it is claimed, arose the supposed indebtedness between the two trustees, but *Galloway*, as a witness, testifies that the balances found in favor of Coffee in the settlement had, in the case of *Murphy*, arose from the purchase, by him,

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of personal property from Coffee, and the amount due to Coffee, for the board of Galloway's family, but, that he has since paid large sums for which the two trustees were at the time jointly liable—as we understand, for the improvement of the joint property—so that upon a settlement there would, in no event, be anything due from the trust estate of Mrs. Galloway to the estate of Mrs. Coffee.

The complainant's case rests upon two propositions: 1. That he became, by the payment made to J. D. Coffee and the assignment made by the latter of the orders on Humes & Poston for the payment of the decree in the Murphy case, equitable assignee of said decree, with the right to file this bill to carry said decree into effect; and 2. that the defendants, Galloway, trustee, and Mrs. Galloway are estopped to deny the validity of the decree referred to, or that in fact there was an indebtedness to that amount, due from the trust estate of Mrs. Galloway.

There is no allegation in the bill as to the purpose for which the money was advanced by the complainant to Coffee. It is not averred or proven that it was for the benefit of the trust estate. The proof is, that the complainant loaned Coffee \$2,250, taking his note therefor due at twelve months with another note for eighteen per cent. interest on the amount, Coffee at the time assigning the orders on Humes & Poston, and guaranteeing the payment. It is true he signed the note and guarantee as "trustee," but it is clear

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that as he had no power to borrow money or bind the trust estate in this mode, that the note and guarantee were his individual acts; the transfers of the orders were only as collateral security for the payment of Coffee's individual debt. It may therefore well be maintained that instead of the complainant becoming equitable assignee of the decree in the Murphy case by virtue of the assignment of the orders, that in fact the assignment by Coffee was a breach of his trust, from which the complainant can take no advantage, he taking the orders with full notice of the facts.

If there was in fact a valid indebtedness as shown by the decree in the Murphy case, it should properly enure to the benefit of the trust estate of Mrs. Coffee. Neither she or her trustee are parties to the present cause, and they would not be precluded by any decree herein rendered from hereafter taking proper steps to realize the sums thus due her. The trustee, Coffee, it is true, had the power to receive the sum due from Mrs. Galloway or her trustee, or, no doubt, to realize the amount by assigning the recovery for a value to a third party, but the transaction, both in form and substance, as shown by the record, was essentially different. It was a loan of money to J. D. Coffee upon his individual promise to repay it, secured by an attempted transfer of a chose in action belonging to the trust estate of Mrs. Coffee, there being nothing whatever to show that the borrowing of the money enured in any way to the bene-

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fit of the trust estate, it not being even so alleged.

It is objected that the Court below improperly admitted in evidence a copy of the decree appointing Coffee trustee for his wife, and defining his power. But the bill alleges that he was trustee; this was a part of the complainant's case, and so far as it became necessary to know the terms of the trust the evidence was certainly legitimate.

The transaction, therefore, not being in legal effect a purchase of the decree in favor of, or indebtedness due to the trustee of Mrs. Coffee, for a valuable consideration paid to the trustee, for the benefit of said trust estate, we hold that complainant did not thereby become equitable assignee of said claim. Besides, we incline to the opinion that under the facts of this case, Mrs. Galloway is not estopped from showing that in fact no such valid indebtedness as represented by the decree in question existed, and that the trust property of Mrs. Galloway cannot now be taken in satisfaction. She would not be so estopped as against the trustee, Coffee, and if the complainant can have any right at all, he can stand in no better attitude.

This, we think, is apparent from an examination of the proceeding in which the decree was rendered. It was simply the petition of Murphy to the Chancery Court to pass his accounts and permit him to resign as trustee, and appoint a successor.

The petitioner states that he had sold one

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piece of the realty, and re-invested the bulk of the proceeds in the purchase and improvement of a suitable residence and home for Mrs. Galloway; the property so purchased being jointly owned by her and her sister, Mrs. Coffee, that the improvements were nearly completed, but that in making the improvements some indebtedness was created which would have to be arranged; the debts being joint debts of the two trustees. There is no allegation in regard to any indebtedness from him to Coffee, or from one trust estate to the other, but the petition prays "that an account be taken between Mrs. Sallie R. Coffee and Mrs. Mary E. Galloway, and a settlement be had of all outstanding indebtedness due on account of such improvements and investments."

Galloway and wife answer jointly and agree to the account prayed for, and the answer of Coffee and wife is to the same effect.

The Chancellor ordered the account prayed for. Murphy filed his report showing receipts and expenditures to upwards of \$20,000. A paper was also filed signed by Murphy and Coffee, showing that upon a general settlement between them there was found to be due to Coffee \$1,422.44 on the 1st of August, 1868, and \$1,446.58 on the 1st of October, 1868, being the excess paid by Coffee on the joint improvements.

The Master reported accordingly, founding his report upon this settlement, and the decree confirming the report, after allowing Murphy to re-

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sign and appointing Galloway his successor, orders him to pay said sums out of the first money coming to his hands.

It will be observed that the decree was, in effect, in favor of one defendant against the other, for although Murphy was the complainant or petitioner, it was for the purpose only of having his resignation accepted.

There was no allegation in the pleadings putting in issue the fact of the indebtedness between the two parties, or raising the question as to the power of Murphy to create a debt, binding the estate of Mrs. Galloway. There was no evidence in relation to the debt, or for what purpose it was created, except the written settlement of the two trustees.

Galloway's deposition was taken, and he says he had examined the *report* of Murphy and found it to be correct, but this, as we understand, does not refer to the settlement between the two trustees. Upon these facts we should hesitate to hold the decree in question a conclusive adjudication, binding the separate estate of Mrs. Galloway for its payment. It now appears to be inequitable to do so in favor of Coffee, and, as we said, the complainant in no event stands in a better attitude.

We do not mean to say that a matter deliberately adjudged by a Court of competent jurisdiction, upon pleadings presenting the case, can be enquired into otherwise than in the regular mode. It can hardly be supposed that the Court, in the

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proceeding referred to intended to adjudge the validity of the indebtedness, or that Murphy had the power to create such a debt, as most clearly he had no such power. Although the marriage contract was made an exhibit to the petition, there was nothing to present the question to the Court. If the matter was not absolutely *coram non judice*, the adjudication ought not to be held conclusively binding upon the separate estate of a married woman.

To have given the Court jurisdiction to pronounce a decree binding the separate estate of Mrs. Galloway to pay the sums specified, the direct question should have been presented by the pleading upon allegations showing the existence, nature and character of the supposed debt, the power of the trustee to contract the same, and praying for a decree directing the trustee in the discharge of his duties or directly subjecting the trust property to the payment of sums claimed to be owing. But the decree in question was entirely outside of the allegations of the pleadings, and upon a matter which, we think, cannot fairly be said to have been within their scope.

The adjudication to be conclusive should be upon the very point brought directly in issue by the pleadings: *Edwards v. McConnell*, Cooke's Rep. 304. See also *Estil v. Taul*, 2 Yer., 467; *Bugg v. Norris*, 4 Yer. 328. Also *Elrod v. Lancaster*, 2 Head, 572, where the Court refused to hold a decree between defendants to a cause conclusive upon them, be-

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cause there was no such antagonism between them as to make them actors against each other.

That was a case where the widow of a testator, with her second husband, had filed a bill against the executor for an account and to obtain the share due them; the children, who were infants, were also made defendants, and in the account and decree their shares ascertained.

But this was held not conclusive in a subsequent bill, filed by them. It is probable, therefore, that upon either of these grounds the complainant should be repelled, but we place our decision more especially upon the first ground.

The decree of the Chancellor, dismissing the bill with costs, is affirmed.

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 4L 559
 11L 217

SARAH W. BOLTON, Ex'tx, v. THOMAS DICKENS, et al.

1. PARTNERSHIP. *Statute of limitation.* The statute of three years presents no barrier in a Court of Chancery to an account between deceased partners.
2. SAME. *Lapse of time.* There is no period of time definitely fixed as an absolute bar. The reasons for refusing relief, because of lapse of time, are, in part, that the loss of papers, death of parties and witnesses, and the failure of memory, involve the transactions in so much obscurity and uncertainty that any attempted settlement will probably fall far short of reaching the truth, and may do injustice.

Cases cited: *Godden v. Kimmel*, 9 Otto, 201; *Marsh v. Whitmore*, 21 Wall., 185; *McEwen v. Gillespie*.

 FROM SHELBY.

Appeal from the Chancery Court at Memphis.
 R. J. MORGAN, Ch.

L. W. FINLAY for Complainant. .

GANTT & PATTERSON, D. E. MYERS, W. M. RANDOLPH and ESTES & ELLETT for Defendants.

DEADERICK, C. J., delivered the opinion of the Court.

On the 10th of June, 1868, complainant filed her bill in the First Chancery Court of Shelby County against Thomas Dickens, Wade H. Bolton, the administrator with the will annexed of Isaac

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L. Bolton, and against the heirs at law of said Isaac L., and the heirs at law of complainant's testator, and the heirs at law of Mary Bolton, the mother of said Wade H. and Isaac L.

The principal object of this bill was to have an account and settlement of a partnership between complainant's testator, Washington Bolton, and defendants, Thomas Dickens, Wade H. Bolton and Isaac L. Bolton, deceased, in the purchase and sale of negroes and cotton, which expired on the 1st day of June, 1857.

The heirs of Mary Bolton, deceased, the mother of defendants, Wade H. and Isaac L., were made parties in order that the title to certain real estate in Memphis might be divested out of them, and accounted for as partnership property, upon the allegation that the title had been vested in her by fraud by said Wade H. and Isaac L., in order to defeat the rights of the other partners.

The defendants, except Dickens and testator's heirs, demurred to the bill upon several grounds. Amongst other causes of demurrer, the statutes of limitations of three and six years were relied upon, as well as the lapse of time.

The demurrer was overruled, and the principal defendants answered. Many depositions were taken, and much documentary evidence was filed in the cause, and on the hearing, the Chancellor held that the complainant was not entitled to an account, and dismissed her bill, from which decree she has appealed to this Court.

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In 1847, Dickens, Wade H. and Isaac L. were partners in negro trading. In 1850 an extension of the terms of partnership to the 1st of June, 1855, was agreed upon, and Washington Bolton then became a partner, although he did not sign the article of copartnership, which had been signed by the others.

At the end of this term, a further extension of the term was agreed to in writing, carrying it up to June 1st, 1857. The last two articles provided for the purchase and sale of cotton as well as negroes.

There is no direct proof that we have discovered as to the residence of the several partners when the first partnership was entered into. But we infer from the record that they all resided in Shelby county, and continued to reside there for many years afterwards. And it is recited in the articles of 1847, 1850 and 1855, that the parties thereto resided in Shelby county.

Dickens, however, as he got more largely engaged in business, purchased in Richmond, Va., and Washington Bolton in Lexington, Ky., while Wade H. remained in Memphis, buying cotton and selling slaves, and Isaac L., to whom most of the slaves bought by Dickens and Washington Bolton were sent, received them at Vicksburg, Miss., and sold them. He was the principal salesman, and employed agents to convey the negroes to other points and sell them. The purchasers, likewise, employed agents to travel and purchase and con-

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vey their purchases to Wade H. or Isaac L. They had thus in their service, from time to time, a large number of agents, to whom, it incidentally appears, very considerable sums of money were paid. But there is not even an attempt to show its aggregate amount, or by whom paid, although each member was to keep such account.

Each of the purchasers was required to take bills of sale and file them with the book-keeper, Wade H. Bolton, and to show all items of expense incurred. This last provision applied also to the salesmen.

These requirements, it is stated in Wade Bolton's answer, were not complied with by complainant's testator, nor by Dickens, but he states as far as he had material he had made out balance sheets, which showed Washington Bolton and Dickens, after the termination of the partnership, largely indebted to the firm.

On the 22nd of May, 1857, about eight days before the expiration of the partnership, Isaac L. Bolton killed a man named McMillan in Memphis, and he and Wade, who was charged as an accessory to the homicide, were arrested and imprisoned. Wade was released on bond in a few days, but Isaac L. remained in prison until he was tried and acquitted, about a year thereafter.

At this time it appears that Dickens was at his farm in Missouri, and Washington Bolton at Lexington, Ky.

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After the trial, it is alleged in the bill, that Wade refused to settle unless the partners would all agree to share equally in the expenses incident to the trial, amounting to the large sum of \$80,000, or, as estimated by others, \$100,000. This large sum, it is intimated, was used, not only for legitimate purposes in defense of the accused, but was largely employed to bribe witnesses and jurors.

There was a stipulation in the partnership articles, that all the partners should bear equally the expenses of any litigation growing out of their business transactions, where any one member was sued; and Wade Bolton insisted, and insists in his answer, that as the difficulty resulting in the killing of McMillan grew out of the purchase of a negro from McMillan, who was a slave only for a term of years, and was sold as a slave for life, that the case fell within the provisions of the articles, and that all the partners so considered it, and all agreed to share the expense. But he denies that he refused to settle until this was done. And he adds, that the most of the expense incident to the killing of McMillan was paid by himself and I. L. Bolton, and that he had paid all the debts of the firm, amounting to more than \$100,000.

A short time before the dissolution of the firm, Dickens had gone to Missouri, where he had a farm, with a considerable number of negroes upon it. Washington Bolton was in Kentucky, and I. L. Bolton had removed to his farm in Arkansas, where,

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we infer, he remained after his release from prison until his death, in 1864.

Washington had entered into partnership with one White, in negro trading, and, from being poor when he became a partner with Boltons and Dickens, he amassed considerable property, and had money. All the partners, in fact, appear to have retired and gone into other occupations, without making a settlement of their partnership.

Washington Bolton died in 1862, and in 1866 Wade Bolton's house was burned, and all his vouchers, as he alleged, and nearly all the books of the concern were destroyed.

In 1867, Wade Bolton and Dickens, the surviving partners of the late firm of Bolton, Dickens & Co., who had become very hostile to each other, had some correspondence, and made some attempts or appointments to meet for a settlement. But before anything was done, this bill was filed, and not long after Wade Bolton answered he was killed, and shortly thereafter Dickens was killed. Thus, before much evidence was taken in this cause, the last one of the four partners was dead.

The complainant knew but little of the business of the firm, as is manifest from the general and indefinite character of the charges in her bill.

What purports to be Washington Bolton's account of negroes bought and expenses at Lexington, is found in a book filed in this case. This contains a long list of negroes, bought by him

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and his agents. Against the names of the negroes are, in some instances, brief memoranda of the time of shipment, and to what point. In other cases simply the word "shipped." In other cases, (the cost in all cases being given), are found the word "sold," and the price, showing the profit, but not showing to who or by whom sold, the date of sale, nor what was done with the proceeds of sale. Besides, this book furnishes intrinsic evidence of being an incomplete statement of the business done by him.

The same may be said of L. L. Bolton's book. It contains mere memoranda, often very briefly and unintelligibly entered, and if both books were accepted as correct, it would be impracticable to obtain from them satisfactory data for a settlement of their accounts. Nor is there any more satisfactory data as to the accounts of Dickens and Wade Bolton with the firm.

The cotton transactions are scarcely less difficult to understand than those in the purchase and sale of negroes.

One of the commission merchants in New Orleans files a large number of drafts drawn upon his house by the firm. All the members were authorized to draw, and most of them did occasionally. Although it is manifest that the greater part of the funds in the hands of commission merchants in New Orleans, arising from the sale of cotton or discount of bills or drafts drawn by purchasers of negroes, was drawn for and for-

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warded to Dickens and Washington Bolton, by Wade Bolton, yet it is impossible to ascertain who were the drawers, and who received the proceeds in every instance.

Another commission merchant, who did business with the firm to the extent of more than a million of dollars, says the drafts paid, drawn by Bolton, Dickens & Co., and their letters, have been destroyed, and they cannot tell by what member of the firm they were severally drawn, except six drawn by Washington Bolton, and that it is impossible to state the account with said firm so as to show the rights and liabilities of said firm, as between themselves. That large amounts were drawn from Lexington, Ky., (Washington Bolton's place of business), and from Richmond, Va., (where Dickens was located), but we cannot tell from his books the amount drawn from either place, nor by whom. He adds that he thinks the firm made no money in their cotton transactions in 1856 and 1857.

If the accounts had been so kept as to present with certainty their true state between the parties, lapse of time might not present any insuperable objection to the jurisdiction of the Chancery Court.

We do not think that the statute of three years, pleaded in this case, presents any barrier in a Court of Chancery to an account between partners.

This Court said, Judge McFarland delivering

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the opinion, at its last term at Knoxville, in the case of *McEwen v. Gillespie et al.*, that "there is no period of time definitely fixed as an absolute bar," etc., and adds: "the reasons upon which Courts refuse relief because of the lapse of time are, in part, that the loss of papers, death of parties and witnesses, and the failure of memory, involve the transactions in so much obscurity and uncertainty that any attempted settlement will fall far short of reaching the truth, and may do injustice." To the same effect are the cases of *Godden v. Kimmel*, 9 Otto, 201, and *Marsh v. Whitmore*, 21 Wall, 185.

In this case we have the loss of papers, which are very imperfectly supplied, to a limited extent, by the frail memory of witnesses, in some cases, perhaps, with strong prejudices or partialities, the lapse of time and the death of all the partners.

Besides, the parties, or any one of them, might have instituted proceedings while all were alive. Instead of that being done, each one, seemingly satisfied with his share of the whole, which the end of the partnership—1st of June, 1857—left in his possession, retired or engaged in other occupations, and no step was taken until about eleven years after the expiration of the partnership.

If any one or more of the partners are subjected to loss, it results from their own negligence, but it is manifest that a Court of Chancery cannot reach any settlement in this case, which might

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not be even more unjust than to leave the parties where they have placed themselves by their own laches.

The Chancellor's decree, dismissing the bill, will be affirmed, and the costs of this Court, and the Court below, will be paid in equal parts by the personal representatives of the four partners.

4L 578
4L 733

THOMAS S. MARR et al. v. BANK OF WEST TENNESSEE.

1. **BANKS.** *Liabilities of subscribers for stock.* By the general banking Act of 1859-60, the original subscriber is liable for the amount of his subscription until the same is paid up, whether he retains or assigns the stock, and this applies to subscribers for stock in a bank chartered before the passage of the Act, although the charter contained no such provision.
2. **SAME.** *General Banking Act Constitutional.* The Act is not unconstitutional, because impairing the obligation of a contract. It does not assume to take away the power to assign stock, but simply to regulate its transfer; imposes no new obligations or restrictions, but prescribes the conditions upon which the original stockholders might assign their stock.
3. **SAME.** *Stock. Liability of assignor and assignee.* The assignees of such unpaid stock are first liable, and if the amount cannot be collected from them, then their assignors, who were original subscribers, are liable.

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4. **SAME.** *Liability of stockholders. Discharge in bankruptcy.* The liability of a stockholder is a fixed, definite sum, and is provable before a bankrupt court, and a discharge in bankruptcy will release such stockholders from liability.
5. **SAME.** *Stockholders. Payment in depreciated bills.* Where a bill is filed to settle the respective liabilities of stockholders in an insolvent bank, and a stockholder has paid his stock in depreciated bills of the bank, he should only be credited with the value of said bills at the time of payment.
6. **SAME.** *Unpaid stock. Statute of limitations.* The statute of limitations will not commence to run until a call has been made for the unpaid stock.
7. **SAME.** *Stockholder. Judgment.* Any stockholder who is an assignee of a judgment rendered in favor of a noteholder, may have his liability extinguished *pro tanto* by said assigned judgment.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
T. W. BROWN, Sp. Ch.

Solicitors: WRIGHT & FOLKES, D. E. MYERS, W. M. RANDOLPH, GEO. GANTT, J. B. HEISKELL, W. M. SMITH, M. P. JARNAGIN, W. P. WILSON and others.

DEADERICK, C. J., delivered the opinion of the Court.

In February, 1854, the Legislature of Tennessee chartered the Bank of West Tennessee, and in March, 1854, books for subscription of stock were opened, and, as the minutes of the proceedings of said bank recite, 8,000 shares of stock of \$100 each were subscribed for, and ten per cent. per share, or \$80,000, paid. This sum was ordered to be deposited in the banking house of Cherry,

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Caldwell & Co. A month later five directors were elected, and a week thereafter C. W. Cherry was elected President, having received all the votes, say 301. About a year after the election of Cherry as President, the next entry appears, and shows a meeting of the stockholders, on the 4th of April, 1855, showing five stockholders. Cherry owned 8,496 shares and the other four one share each, there having been, as recited, 500 additional shares subscribed, making a total of 8,500. All the stockholders were elected Directors, and Cherry made President. On the 12th of April, 1855, the Directors met, and were informed that Cherry had transferred his stock, but to whom does not appear, and his seat was declared, thereby, to be vacant, then each of the Directors successively resigned, and the vacancies were filled as they occurred. On the 12th of June, 1855, a new President was elected to fill the vacancy which had occurred on the 12th of April, 1855, and a Cashier were elected. March 17th, 1856, at a stockholders meeting, the proceedings of which are recorded in four lines, five Directors were elected. Whether these were other stockholders than those elected, or in what proportion the stock was then held, does not appear. At a meeting of Directors, April 26th, 1856, certificates of deposit for \$20,000 were directed to be issued to pay for the charter and other expenses incurred. The next record is of a special meeting of Directors held March 18th, 1857, to ratify and confirm certificates of deposits

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issued in February, 1857, and to cancel other certificates of deposits issued April 26th, 1857. From this time to May 15th, 1858, four entries appear, recording resignations of Directors and other officers, and election of new ones. At this date—May 15th, 1858—it appears “sundry bills and notes” were discounted. Thenceforth, to the 22nd of November, 1858, similar entries appear, at which last date it appears \$52,000 in notes had been issued. From the 22nd of November, 1858, to the 19th of May, 1860, four entries appear; two the 1st of December, 1858, and the 4th of January, 1859, recording discount of “sundry bills and notes.” On March 25th, 1859, the stockholders held a meeting, at which Directors were elected, and by them a President; and the other March 25th, 1860, recording a stockholders meeting and the election of Directors. On the 19th of May, 1860, a number of resignations and election of Directors took place, when P. C. Bethell, J. M. Williamson and John A. Sannoner transferred to the Memphis Insurance Company 7,995 shares of the capital stock of the Bank of West Tennessee, which, with one share each held by Apperson, Nelson, Townsend, May and Church, making 8,000 shares, is said to be the whole of the stock. Thus, 500 shares seem to have been dropped off from the amount of capital stock.

T. A. Nelson and Ben May were elected President and Cashier. On the next day a committee was appointed to receive the assets of the insur-

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ance company, who were also authorized, in connection with Bethell and Williamson, to burn the old issues of the bank then in its possession.

On the 22nd of May, 1860, books were ordered to be opened to receive subscriptions to the capital stock of the bank, upon which five per cent. was to be paid, at the time of subscription, to Ben May, Receiver, and a call of ten per cent. was to be paid on the 1st of October next thereafter.

By-laws were adopted, one of which was that "any stock owned by a stockholder in this bank may be transferred to any other person *on the transfer book of the bank*, the person making the transfer shall cease being a holder of such stock on signing said transfer, and the person to whom it is transferred shall, in all respects, assume the position of the person transferring such stock.. And such are the substantial provisions of the charter.

The reorganization of the bank was thus effected, and thereafter meetings were regularly held, and the ordinary business of banking institutions carried on until the bank was removed South under military orders, and by direction of the Board of Directors in May, 1862.

In this purchase the insurance company paid \$30,000 for the charter, plates, etc., and an arrangement was made with Bethell and others, by which the bank was protected against the payment of any outstanding notes of the bank. The insurance company was absorbed by the bank, al-

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though in form it had become the purchaser of the stock of Bethell, Williamson and Sannoner, yet the transaction was in substance and effect the purchase of the charter under which an entirely new organization was had. A new subscription of stock was made to the amount of \$780,800, which was formally transferred by the insurance company to the several subscribers, and upon this new subscription of stock the bank operated. No assets of the former organization were transferred to the new. Under these facts, when the cause was here in 1873, it was held that the bank was organized in May, 1860, although operating under a charter granted in 1854, and that the subscribers for stock in and after May, 1860, were the original stockholders, as it appears that all the liabilities of said bank, then and now outstanding, are those created since the new organization. It is true the meager record of the proceedings had under the charter up to the transfer in May, 1860, recite that \$80,000 had been paid in upon subscriptions of stock made, but we are satisfied, from an examination of the record, that this is not true in point of fact, as there is nothing to show what was done with this large sum, and it also appears that expedients to raise money to defray expenses were resorted to, and from the frequent shifting of stock, which often appeared almost entirely in the name of one person, and repeated changes of officers, indicate that the organization was more nominal than real, and kept up, not for the purpose

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of legitimate banking business, but with the view of speculation, until the transfer in May, 1860.

In the opinion of this Court, pronounced in 1873, it is said: "The assignment of stocks by the owner does not discharge him from liability. Upon the subscription it becomes corporate property, impressed with a trust in favor of the note-holders. It was in effect an agreement by the subscribers to pay into the bank the amount subscribed by him," etc.

The learned Special Chancellor, Hon. Thomas W. Brown, who rendered the decree from which an appeal was taken by a number of stockholders, held the language quoted as applying to the original, and not to intermediate assignors.

We accept his interpretation as correct, and even considering it as an original and open question in a well considered written opinion, he very ably sustains this view upon the ground of the application of the banking act of 1859-60. In terms this act holds the original subscriber liable until his subscription is paid up, whether he retain or assign the stock. It is objected, however, that no such provision is contained in the bank's charter, and as the charter antedates the act, and as the act imposes an obligation on original stockholders, not contained in the charter, it is inoperative, because it impairs the obligations of a contract, or restrains them from the exercise of a valuable privilege secured to them by the charter.

While it is true the State may not impair the

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obligation of a contract or take from the corporation any essential right, which is conferred by the charter, yet it has been held that this inhibition against impairing the obligation of contracts, does not so far remove from State control the rights and properties which depend for their existence or enforcement upon contracts as to relieve from the operation of such general regulations, for the good government of the State, and the protection of the rights of individuals, as may be deemed important. All contracts and all rights are subject to this power, under the police power of this State. *Cool. Cons. Lim.* 574.

It was under this general power to regulate, that the Legislature of Vermont required each railroad and corporation to erect and maintain fences along the line of road, and cattle guards at farm and road crossings, and made the company and its agents liable for damages occasioned by the want of such fences and guards. As to corporations in existence before the passage of this act, it was objected that its effect was to modify, and to that extent, violate the obligation of the charter contract. But it was held that the power of the Legislature to control existing railways in this respect may be found in the general control over the police of the country, which resides in the law making power in all free States: *Ibid*, note 1, citing 27 Vt., 140. So laws may be passed to punish neglect or misconduct in managing ferries and to secure the safety of passengers from danger,

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impositions, etc. But the State cannot take away the ferries: *Ibid*, 576, note 1. So it has been held in Maine and Massachusetts that a statute which makes the stockholders of an existing corporation liable for the future debts of the corporation does not infringe the chartered franchises of the corporation, but merely regulates the future relations of debtor and creditor, and is hence a valid exercise of legislative power: *Thomp.* Liability of Stockholders, sec. 65, citing a number of cases. In this case the act of the Legislature is a general law, applying expressly to all banks already chartered and those thereafter to be chartered. It does not assume to take away the power to assign stock, but simply to regulate its transfer; imposes no new obligations or restrictions, but prescribes the conditions upon which the original stockholders might assign their stocks, and if in the cases of railways and ferries the Legislature might impose obligations not specifically required in the charters of the company involving the outlay of money, and to that extent an injury, we see no reason why the Legislature may not, when the public good requires it, regulate the transfer of stock.

In this case the new organization was had after the enactment of the banking law, and with knowledge of its provisions.

But this question was settled by the former opinion and decree in this case, and is *res adjudicata*, the assignees in such cases being first liable,

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and if the amount due cannot be collected of them then their assignors who were original stockholders under the new organization will be liable. So if there be any new parties who were not included by the former opinion and decree, the same conclusion is reached now as then, and the Chancellor's decree on this question will be affirmed.

But it is objected that this question is not raised by the pleadings. The original bill expressly calls for a discovery as to the transfer of stock as to whom and by whom transferred. The primary object is to compel those liable to pay up the unpaid stock to satisfy complainants' claims, and prays for general relief. To this same end the cross bill was filed by order of this Court, and looking to the general scope and objects and prayers of both bills, we are of opinion they are sufficient to hold all the original, as well as present stockholders, liable.

The bank continued active operations in the conduct of ordinary banking business up to the time of its being taken south, May 28, 1862. Three dividends had been declared previous to this time, which were applied in payment of stocks. These payments by the opinion at the last term were declared valid, upon the ground the bank was then solvent. For the same reasons we are of opinion that any payments made upon stock previous to the bank being taken south should be allowed as valid payments, and all payments

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made after that time and after the return of the bank, in 1865, should be credited at their value as compared with legal tender notes, at the time of payment.

Pending this suit several stockholders have obtained their discharges in bankruptcy, which they have pleaded in these cases. Solvent stockholders seek to hold such bankrupt parties liable, upon the ground that although their debt to the bank may be discharged, still they are liable to them to contribute to the discharge of the debts of the note-holders. That this is a new and subsequent liability from which they have not been discharged under the proceedings in bankruptcy, and that if it did in fact exist at the time of the bankruptcy discharge, it was impossible to ascertain its value, and that such claims, therefore, were not provable under the bankrupt law. On the other hand it is maintained that each stockholder is individually liable to the bank for the sum due upon his stock and no more. It is a several, not a joint liability, as to which each member stands liable for his own debt, and although if one stockholder pays more than his proportion of the debts of the company, he may compel contribution; yet if a stockholder is discharged from his liability to the company, he cannot be compelled to pay the amount of which he is discharged to another stockholder, that his liability to contribute begins and ends with his liability to the company.

Again it is insisted that if the solvent stock-

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holder could be considered as standing in the relation of a joint surety for a common debtor to the bankrupt his claim was provable under the provisions of the bankrupt law, and not having been proved before the bankrupt's discharge cannot now be enforced against him. If a stockholder pays more than his proportion of the debts of the company he may have contribution from other shareholders who have not paid their just proportions.

But the liability of the stockholder is not a joint one, like that of sureties, equally bound for the same principal, where even a discharge of one from liability to the common creditor would not relieve him of liability to his co-sureties, who afterwards paid the whole debt. But the stockholder stands liable for a definite sum to the company and no more. It is a severable, unequal and limited liability as to which each member stands liable to the company or corporation and through it to creditors. Hence, if he pays up his own liability to the company or is discharged therefrom it terminates his liability as a stockholder, which cannot be revived at the instance of other stockholders. Such of the stockholders, therefore, as have been discharged in bankruptcy are released from liability

The learned special Chancellor has reached the same conclusion, upon very plausible reasoning, that the bankrupt's plea of discharge must prevail because contestants who now claim contribution

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from them should have presented their claims and had them adjudged by the bankrupt court, as provable or rejected as not provable. Our statute of limitation has no application to actions to enforce payments of bills or notes issued for circulation as money: Code, sec. 2779. But the Chancellor is not required to hold the case open for an indefinite time, for filing notes by the creditors, but may fix a period beyond which no further leave to file such bills will be granted. The bill of Allen and others may be regarded as an original bill in the nature of a bill of review, filed to impeach decrees of the Chancery Court, and of this Court, for fraud.

Where a decree has been so obtained a court of chancery will relieve those who have been injured thereby.

It is alleged that Nelson and May, under whose exclusive management the bank had been since its removal south, and who had conducted the defense in behalf of stockholders against Marr's bill, and who had filed a cross bill to make all stockholders and bill-holders defendants, had assured complainants that they need not employ counsel in said bills, that they would attend to and protect their interests, but they say instead of protecting they disarmed them, and then obtained unjust decrees in their favor against their interest and to their prejudice. They therefore impeach said decrees by which May obtained judgment in his favor, to their injury, and Nelson's wife and daughter obtained judgment

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through Nelson on issues of the bank, bought up by Nelson and claimed by him to have been bought with his wife's separate means, and so decreed, whereas it is alleged such issues were bought up with his own or issues belonging to the bank, he being at that time largely indebted to the bank. The allegations as to the representations made by May and Nelson are substantially proved and proof taken which warranted the setting aside said decrees in favor of May, which was done by the Chancellor, and May has not appealed. The Chancellor also ordered a reference to the Master to hear and report as to whether the separate estate of the wife and daughter of Nelson paid for the issues on which judgment had been rendered in their favor. Some evidence having been taken, the Chancellor deemed it proper to attain the ends of justice that further enquiry should be made.

As to these matters the Chancellor's decree was correct.

Enough had been alleged in the cross bill and established by proof to show complainants had been prevented from employing counsel and making defense to said bills, by the representations of Nelson and May, and that they were injured thereby, and we approve and affirm the Chancellor's decree, in respect to May's claims, and in ordering a reference as to the claims of Nelson's wife and daughter.

Allen's bill also impeaches the decree in favor of J. M. Nelson, a son of said T. A. Nelson, in

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whose favor a decree had been rendered on issues of the bank filed by him, and in refusing to hold him liable as a stockholder in said bank.

We are of opinion there is no ground to impeach the validity of said F. M. Nelson's claim to the judgment in his favor, on the issues of the bank. The evidence shows he bought and paid for them himself and they belonged to him. Nor is there sufficient evidence to hold him liable as a stockholder.

The stocks transferred to him on the books of the company was so transferred without his knowledge or consent, and was never accepted by him, although marked as paid up stock. As a clerk for May, for rather at his request, while the bank was being wound up as an insolvent institution in transcribing, he transcribed an entry of a large number of shares standing in his name as paid up stock. But he swears he did not claim them, nor know why they were transferred to him, and never did assert any claim to them, or by word or act accept or treat such stock as his own, and there is no evidence to contradict his statement, on the contrary it is sustained.

The Chancellor held that said F. M. Nelson was not liable on such stock, and we affirm his decree as to this matter.

Guild Deloach also appears as a stockholder, but it further appears that she was a minor when stock was subscribed for, and she relying upon that defense, it was properly held by the Chan-

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cellor that no decree could be rendered against her.

The Chancellor has very fully considered and discussed the pleas of the several statutes of limitation relied upon by the personal representatives of deceased stockholders. He held the defense insufficient upon several grounds, one of which was, that no call was made for payment of stock. The statute does not commence to run until a call for the payment of the stock. This we regard as a conclusive argument against the defense, without considering or discussing the other grounds stated in the Chancellor's opinion.

P. C. Burford, a non-resident, died September 21, 1863. On the 2nd of October, 1865, S. R. Burford administered on his estate, and a few days thereafter paid what appeared to be the balance due on his intestate's stock, amounting to \$11,235.71, in issues of the bank. S. R. Burford, the administrator, was a non-resident of the State at the time he administered, and has so continued to the present time. Marr's bill was filed the 16th of July, 1866, against a few named stockholders, and all the unknown stockholders, May, cashier, and Nelson, president, as directed by this Court, filed a cross bill, March 11, 1868, to bring all the stockholders before the Court, and P. C. Burford was named as a defendant therein. On the 6th of February, 1874, Thomas H. Allen and others filed their bill against all the stockholders and

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their personal representatives, and to this bill S. R. Burford, administrator, etc., was made a defendant. He pleaded the several statutes of limitations in defense of the action and also relied upon his payment of said stock. Burford, the administrator, was out of the State when the cause of action accrued against him and so remained. By sec. 2762 of the Code it is provided if a cause of action shall accrue against any person, who shall be out of this State, the action may be commenced after his return, and the statute of limitations shall not run during absence from or residence out of the State.

This statute has been held to apply to administrators, 1 Lea, *Smith v. Arnold*. The bill by Allen and others, was filed amongst other things to bring in all stockholders and their representatives in order to settle their respective liabilities, and said Burford, administrator, was first brought before the Court by said bill, and he is by it for the first time called upon for payment of balance due upon his intestate's stock. Intestate had not been called on to pay it in his lifetime. The administrator is entitled to a credit on stock only to the amount of the value of the money paid in October 1865.

The decree against C. B. Church is erroneous, because we have announced in this opinion that all payments made upon stock and accepted previous to the removal of the bank south, to wit, (May 28, 1862) were valid and to be credited at

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their nominal amount. This was substantially held by this Court, in 1873, and Church having paid in full, 14th of May, 1862, is liable for nothing more. Of course this will apply to all similar cases, if any there be.

As to S. B. Williamson and G. Falls the decree is correct and will be affirmed. It is insisted that Williamson is not liable, because a decree against his personal representatives was rendered for \$550, and paid, and no decree was rendered against Falls, prior to the appeal of 1871 to this Court, and complainant in cross bill did not appeal. But there is no adjudication in their favor, and being parties to the said cross bill they are liable to such other or further decrees as were necessary to attain the objects of the bill. The petition of W. F. Taylor to be released in part of the purchase of two judgments against M. A. Allen, made to him under order of the Chancellor, we are of opinion should have been granted. The receiver and Taylor both believed the smaller judgment as well as the larger one was due and unpaid at the time of the purchase and sale. They bargained under a mutual mistake. The smaller judgment had in fact been paid. It is not right that the vendor should again be paid for the same thing. Nor is it equitable that Taylor should pay for it. The decree will be corrected in respect to this, abating the price according to the amount agreed to be paid for both judgments. Without specifying the particular causes in which the ques-

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tion arises, we hold that payments made on stocks before removal of the bank south in May, 1862, are valid, that present holders of stocks is first liable, then the original subscriber under the reorganization in May, 1860; that at the time of payment on stock in issues of the bank their value is to be estimated, not the time at which such issues were received, whether received in the due course of business or purchased. Any parties against whom judgments have been rendered, who are assignees of any judgments rendered in favor of note holders, may have the judgments against them extinguished *pro tanto* by said assigned judgments, in the discretion of the Chancellor. This direction to, or discretion of the Chancellor will not apply to the cases of Mrs. Nelson and her daughter, as to whose claims the Chancellor has directed further inquiry to be made, and which will be reported upon and further decided after this cause is remanded. It is believed that the general rules laid down, and principles applied to special cases, are sufficiently comprehensive to dispose of all questions arising upon these records, in this Court.

The Chancellor's decree, except so far as it may be modified by this opinion, will be affirmed, and the cause will be remanded for further proceedings, and the costs of this appeal will be paid out of the fund in the hands of the Master, or to be received hereafter.

Darusmont v. Patton.

T. S. DARUSMONT v. CHARLES PATTON et al.

SUPREME COURT PRACTICE. *Appointment of a Receiver. Unpaid taxes.*

It is a good ground for the appointment of a receiver of land in a suit pending in this Court, where the decree below declares the applicant to have a lien on the land for the payment of debt, that there are taxes due and unpaid which are about to be enforced by a sale of the land, unless the party in possession will pay the taxes in a reasonable time.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

W. M. RANDOLPH for Complainant.

GEORGE GILLHAM for Defendants.

COOPER, J., delivered the opinion of the Court.

The complainant has applied for the appointment of a receiver of the lands in controversy, after giving written notice to the solicitors of the defendants of their intentions. The bill was filed for the purpose of subjecting the land to the satisfaction of the debt of the complainant for the purchase money. The decree below was in favor of the complainant, and the defendants appealed. It now appears, from the sworn statements of the collecting officers, that there are unpaid taxes on the land for several years, for which tax sales

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have in part been made, and the lands bid in by the public officials under the law. It also appears that a bill to enforce the lien for these taxes is about to be filed under the recent rulings of this Court. Under these circumstances, the complainant will be entitled to a receiver, unless the past-due taxes are paid in a reasonable time. The decree below is *prima facie* evidence of the complainant's interest in the land, and a failure of the defendant in possession to pay the taxes is a sufficient ground for the appointment of a receiver, for the neglect to pay the taxes might result in the loss of the property to all parties by a title against which the *lis pendens* would be of no avail. The appointment would, however, be rendered unnecessary by the payment of the taxes.

The complainant may take the order for a receiver and a writ of assistance to put him in possession of any part of the land on which the taxes are in arrears, unless within sixty days from the entry of the decree, the defendant in possession of such part of the land shall produce to the Clerk of this Court satisfactory evidence of the payment of the taxes due on that part.

Evans v. Beaumont.

D. M. EVANS et al. v. G. T. BEAUMONT et al.

WILLS. *Legacy. Subsequent gift. Ademption. Proof must be clear and satisfactory.* A legacy of \$5,000 by will; subsequent gift of valuable lot. Held on the face of the two transactions; no presumption arose of ademption. Both gifts being in writing, the Court does not decide whether parol proof could be introduced to show the *purpose* of satisfaction on the part of testator, but conceding for the argument it may be done, that such proof must be clear and satisfactory, and evidence of loose conversations, in which testator spoke of the gifts and a purpose to alter his will, or that he was not able to give the legacy after the gift of the lot, is not such satisfactory evidence.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
S. P. WALKER, Ch.

W. M. RANDOLPH for Complainants.

HARRIS & TURLEY and BELCHER & JORDAN for
Defendants.

FREEMAN, J., delivered the opinion of the Court.

This bill is filed by complainants to enforce the payment of a legacy of \$5,000 given to Julia Neely, now the wife of complainant, Evans, by the third clause of the will of Claiborne Deloach.

This legacy was to be paid, provided the estate of said Deloach should be worth fifty thousand

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dollars at his death. It was to be held in trust by Thomas H. Allen to her sole and separate use, free from the debts or control or contracts of any husband she might marry, for the term of her natural life, and at her death, go to her children. The trustee was to invest and manage the fund as he deemed best for her interest, during her life, and the interest of her children after her death, so as best to provide for their comfortable support out of the income or profits of the same.

Deloach died the 29th of July, 1834. His widow was appointed administratrix with the will annexed, and has since intermarried with G. T. Beaumont, her co-defendant.

It is conceded that the estate was worth fifty thousand dollars at the death of the testator, so that, nothing more appearing, the legacy is due, and complainants entitled to a decree.

But this is met by respondents as follows—that is to say: That on the 1st day of May, 1862, the said Deloach made a deed of conveyance to said Julia in fee of a certain valuable lot in the city of Memphis, and, to use the language of the answer, “the force and effect of this deed, if held valid, was to satisfy said legacy.” It is insisted, however, in the answer, that this deed was not effective to carry the title to the said Julia, for want of delivery, but that an action of ejectment was then pending to test this question, and in the event it is sustained, then the above effect is predicated of said deed.

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On this statement, as it stands in the pleadings, it could scarcely be contended that respondents could maintain their contention that the legacy was satisfied, unless it could be maintained as a proposition of law or an inference of fact, that a legacy in money for the life of a party, and then to her children, is conclusively, or at any rate *prima facie* presumed to be satisfied by a subsequent conveyance of real estate to the legatee, without regard to the intention, or the relative value of the property to the legacy. No authority, we believe, goes to this extent. All authorities, we believe, agree that where the gift, by will and the subsequent portions advanced, or property conveyed, are not *ejusdem generis*, the presumption as such, will be repelled, or will not arise, and nothing more appearing, the legacy will be payable. Thus it is said—2 Leading Cases in Eq., top 571—"Thus land will not be presumed to be intended as a satisfaction for money, nor money for land." However, apparently exceptional cases are referred to, deciding it might be done: 15 Vesey, 507, dependent probably on other elements, additional and beyond the simple facts of a gift of personalty, and an after conveyance of other property, showing the intent to satisfy the former claim: See cases cited *Ibid.*

It is maintained, however, most earnestly, that facts are shown in this record, both by direct parol proof, as well as from the circumstances and situation of the parties, and a fair inference to

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be drawn from these, that it was the intention and purpose of Deloach that the gift of the lot should be in satisfaction of the legacy, and not that she should have both.

This contention presents for its solution several questions of more or less difficulty, some of them involved in almost hopeless perplexity, if we should undertake to solve them by attempting to reconcile the conflicting opinions of the ablest Judges, who have held opposite views upon them. We shall not attempt to do this—the task would be hopeless.

The leading facts in the case, that bear upon the relation and situation of the parties, are substantially as follows: Julia Neely was the daughter of a deceased sister of the testator, her father and mother having died, leaving her no estate, she was taken by him into his family in 1855, when she was about twelve years of age, brought up as one of his children, educated as such a child, and seems to have been recognized as standing in the place of an adopted child by the testator up to his death. He evidently felt it to be his duty to provide for her out of his estate, as shown by the will, and that he purposed doing this liberally, is further evidenced by the gift of the lot, estimated by some witnesses as at one time worth thirty thousand dollars, probably much less as stated at the bar at this time.

On this state of facts, if we were to adopt the rule laid down by most of the authorities, that in

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order to raise the presumption, as a matter of law, of satisfaction of a legacy by a subsequent gift, it must be a case between parent and child, or one standing in *loco parentis*, we should say, such was the relation shown in this case. It therefore becomes unnecessary for us to decide authoritatively in this case, whether the rule be correct or not. Suffice it to say, that we are unable to see the force or propriety of the reasoning by which it is supported.

In the case of a gift by will to a child, or one in the place of a child, and subsequent gift of substantially like kind and degree of benefit, without other evidence, under the rule, the law raises a presumption of satisfaction or ademption of the legacy by the subsequent gift, either in whole or in part, as its value may be: Smith, Marr, Eq., 381, Story Eq. J., Sec. 1111, *et seq.* But it is said this doctrine of constructive ademption of legacies has not been applied to strangers, that is persons who do not stand in these relations, and the *onus* of proving the contrary is on the party asserting it.

By these rules an arbitrary presumption is made against the child, or one standing in the place of a child, that a double portion is not intended, and the party only entitled to take the latter or compelled to elect between the two, while the stranger has no such difficulty in his way, and is presumed to be entitled to the bounty of the testator in both cases, until his right is disproven. We can but

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feel, that a rule, as said by Lord Thurlow, that rests on the principle that a father has less affection for his child than a stranger, is not soundly based in reason, and not such as should be upheld by judicial adoption in our State. It is based on a logic that may be specious, but certainly is not found to have any foundation in the nature of the case, nor does it tend to reach the ends of either legal or natural justice. See Story's Eq. J., secs. 1100, 1110.

As we have said, however, we think it clear from the facts in this record, the testator intended by this legacy to provide a portion for the legatee, as standing to her in the place of a parent, and the case must be so treated: *Pynn v. Lockyer*, 5 Mylne and Craig, 29 to 35, cited Story's Eq., vol. 2, p. 350, note 1; *Powys v. Mansfield*, 6 Sim, R. 528, Story's Eq., vol. 2, 1111, note 1.

The case then is, of a gift by will, made in 1858, of five thousand dollars in money, on the condition, and with the limitations we have stated, and a subsequent gift of real estate in 1862, of much larger value, and we may add, with limitations of the same general character, differing, however, in several particulars. On the face of these facts, the two gifts stand independent of each other, nothing else appearing, clearly there is no ademption. Both stand on the terms of the instruments evidencing them, and there is nothing on the face of the will or the deed to connect the one with the other. or to show any intention of

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the testator by the last gift in any way to affect the integrity of the first.

The question then is, whether that purpose, as an intermediate element, can be proven, so as to substitute the latter gift for the first, or show it was made in satisfaction of the first; and then assuming this may be done, how, the question would be, and by what character of testimony? Whether by parol testimony, in a case like the present, or only by evidence in writing.

On these questions we may find authorities, apparently, if not actually, sustaining either view, that has been maintained by counsel in the able arguments submitted in this case.

After a most careful examination of the testimony in the record, we do not deem it necessary to go into these questions, or authoritatively to lay down the rule, one way or the other.

Conceding that parol testimony may be admitted to show the intention of a testator by a subsequent gift, either where the subsequent gift is *ejusdem generis* or otherwise, and that this is a question of intention, as seems to be the principle given by the leading authorities, yet, we think, in any view of it, such intention must be shown by clear and most satisfactory testimony in a case like the present.

The party has the right to the legacy on the face of the will, and the condition being shown on which it was given, she also has the undisputed title to the lot given by the testator. To show

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that the first given has been satisfied and discharged by the last, the testimony should, as we have said, be clear and satisfactory. We have given careful examination of the proof in this record, and do not find such a case.

In the first place it is attempted to be shown by proof of a conversation had with the testator, had probably early in the year 1864, the deed having been made in May, 1862. This conversation amounts to nothing more than the fact that he had given the lot, and intended to alter his will. He had ample time to have done this, after making the deed, and had the same opportunity after this time and before his death. The fact, that with the notion that it was proper to alter his will, he failed to do so, and that he died after opportunity to have done so, would lead to the inference that he had abandoned such purpose, and determined to let the two gifts remain intact as they stood.

Another conversation is testified to, with complainant a few days before her marriage, in 1865, purporting that she had been told by the testator, on his death bed, that he had given her by his will the five thousand dollars, but was now unable to do so, and that his children would probably be poor.

We may remark, that this character of testimony is always held to be the weakest of all testimony, and in this case, we can but feel that it is, to say the least of it, subject to the suspicion

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of being slightly colored, coming from two sisters of respondent, whose sympathies would naturally be in favor of such sister.

Conceding the fullest force that it is entitled to, we do not think this testimony serves to show any intention on the part of the testator, in such definite form, as it should appear, as that right evidenced by a solemn will, left unrevoked, should be overturned by it, or be deemed discharged and satisfied. Besides, the question would most naturally occur, if such had been the purpose of the testator, why not say so in the deed, or why not alter the will? The most that can be said from this evidence is, that subsequent to the making of the deed of gift of the lot, the testator had an unexecuted, floating notion, that he was not able to give both the legacy and the lot, and had thought of changing his will, but died without ever having carried this purpose into effect, or probably without ever having definitely determined to do so.

We therefore conclude, that even conceding the testimony competent, which we do not definitely decide, it fails to make out the contention of respondent, and the result is, the decree of the Chancellor must be reversed, and decree, as in this opinion, costs to be paid by respondents.

W. E. LYNN for Porter.

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J. L. GAINES, Comptroller in error, v. L. B. HERRIGAN.

1. **CONSTITUTIONAL LAW. *Salaries of Judges.*** The Act of 1879 fixing the salaries of Judges of the Supreme, Chancery and Circuit Courts is valid and constitutional.
2. **SAME. *Acts of Legislature. Journals.*** The weight of authority is that notwithstanding an Act has the signature of the Speakers of the Senate and House and is approved by the Governor and is published by proper authority, the Courts, nevertheless, may look to the journals of the two houses, to see if the same was constitutionally passed. Whether this rule prevails to its full extent in this State in view of the new constitutional provision requiring bills to be signed *in open session* and *noted* on the journals, is reserved.
3. **SAME. *Same. Same.*** The said Act of 1879 regularly passed the Senate and in the House was amended in the second section by striking out "Thompson & Steger's Code" and inserting "Revised Code of Tennessee" passed the House, but amendment never concurred in by Senate; *held in substance* there was no amendment, "Thompson & Steger's Code" and the "Revised Code of Tennessee" being the same book.
4. **SAME. *Judges Salaries.*** The constitutional provision that the salaries of judicial officers shall not be diminished or increased during the time for which they were elected does not apply to their *term* of office, and where a Judge is appointed to fill out the unexpired term of a deceased Judge, he is entitled to compensation fixed by law at the time he assumes the duties of the office.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. J. O. PIERCE, J.

Attorney-General LEA for Comptroller.

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FINLAY & PETERS and C. H. EWING for Horrigan.

McFARLAND, J., delivered the opinion of the Court.

This is an agreed case submitted to the Circuit Court of Shelby County, to determine what salary L. B. Horrigan, Judge of the Criminal Court of said County, is entitled to. Under our present constitution Judges were to be elected in August, 1870, and every eight years thereafter. When vacancies occur they are to be filled for the unexpired term. The election for the second term, under the constitution, was in August, 1878. A vacancy having subsequently occurred in this office, Judge Horrigan was appointed by the Governor on the 1st of August, 1879. At the session of the Legislature of 1879 and previous to Judge Horrigan's appointment, an Act (Chapter 3 of said Acts) was passed and took effect, providing that each Chancellor, Circuit and Criminal Court Judge (except County Judges) and Judges of special Courts, hereafter appointed or elected, shall receive two thousand dollars per annum. The second section repeals the law previously in force by which the salary of said officers was \$2,500 per annum.

The first objection to this act is, that it was not in fact passed by the two houses of the Legislature in the mode required by the constitution, especially that clause which provides that no bill

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shall become a law until it shall have been read and passed on three different days in each House, and shall have received on its final passage in each House the assent of a majority of all its members and shall have been signed by the Speakers and Governor.

The facts as shown by the journals are in brief these, the bill was introduced into the Senate and known as Senate bill No. 3; it passed that body regularly, and was transmitted to the House, where it was amended as follows: In referring in the second section to the previous act, which was thereby repealed, it was referred to as "so much of an Act passed January 30, 1867, now section 4539a of "Thompson & Steger's Code." The words "Thompson & Steger's Code" were stricken out and the words "Revised Code of Tennessee" inserted, and as thus amended the bill was finally passed; but it was not again transmitted to the Senate for that body to concur in the amendment.

The bill was, however, subsequently signed by the Speaker of each House in open session, and the fact noted upon the journals, as required by the eighteenth section of article 2 of the constitution.

It is earnestly maintained that as it is shown that the Senate did not concur in the amendment of the bill adopted by the House, that the bill as published never did receive the assent of the two Houses. Many authorities are referred to to show that notwithstanding an act has the signatures of

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the two Speakers and the approval of the Governor, and is published by proper authority, nevertheless the Courts may look to the journals of the two Houses, and if from them it appear that the bill was not constitutionally passed the Act must be declared void. Such seems to be the decided weight of authority. Whether this rule would prevail to its full extent in view of the *new* provision of our present constitution, requiring all bills to be signed by the respective Speakers, *in open session*, and the fact of such signing to be noted on the journals, need not, in the view we have taken of the question, be definitely settled. It might be plausibly argued that this provision was intended to furnish conclusive evidence that the bills, in the form finally signed by the speakers, were the bills actually passed by the two Houses. The Act being performed in open session, it could hardly occur that the signatures should be affixed to bills never actually passed, without some member of the body discovering the mistake. It would seem this ought to be evidence of as high authority as the journals, at least as to all matters not expressly required to be shown by the journals. However we do not mean to intimate any decided opinion upon this question.

We hold that conceding the journals to establish all that is claimed, the bill was not amended in the House so as to change its legal import and effect. According to the opinion of a majority of this Court at the present term, the first section

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of this Act would have effected a valid change of the law if the second section had been omitted altogether. The second section only purports to repeal so much of the previous law as conflicts with the first section; it is referred to as an Act passed January 30, 1867, now section 4539a of "Thompson & Steger's Code," in the original Act; of the "Revised Code of Tennessee" in the Act as amended. The Act referred to is the same; the reference to the original Act was sufficient, especially as the substance is also given. The book referred to in the original Act as "Thompson & Steger's Code," and in the Act as amended as "Revised Code of Tennessee," we know to be the same book. It was more properly designated in the original bill. The Code of Tennessee was adopted in 1858. The subsequent compilation of Messrs. Thompson & Steger is a re-publication of the "Code" with the subsequent acts, as additional sections under the appropriate original sections, with letters affixed to distinguish them. This was the book referred to, and the Act referred to and repealed is the same.

It is earnestly argued that it would be a very great stretch of judicial power for a Court to undertake to say that the amendment is immaterial; that this was a question for the two Houses of the Legislature; that it is enough for this Court to see that the bill was *amended* in the House, and the Senate did not concur in the amendment; that we cannot look beyond to see in what the

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amendment consisted. But it seems to us that it would be the exercise of a power far more arbitrary and unwarranted for the Court to declare the Act of the supreme legislative authority void upon an objection like this, in which there is no substance. If we may look to the journals to see that *in form* there was an amendment not concurred in, we may look further to see that *in substance* there was no amendment. We have no direct authority upon the point, but we are of opinion that the Act cannot be declared void, for the reasons given. The bill did receive the assent of both Houses in the constitutional mode.

It is next argued that if the Act was passed in accordance with the constitution it can only apply to Judges who may be elected in 1886. Part of the 7th Sec. of Art. 6 of the constitution is in these words: "The Judges of the supreme or inferior courts shall, at stated times, receive a compensation for their services, to be ascertained by law, which shall not be increased or diminished during the *time* for which they are elected.

The argument is, that the latter clause was intended to prohibit the increasing or diminishing of a Judge's salary during the *term* for which he is elected. That is to say, as the judicial terms are eight years, and the terms of all judges begin and end at the same time, it was the intention that all Judges holding during the *term* should have the same salary, and that the salary should not be increased or diminished during the *term*; that the

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Judges who are elected or appointed to fill out unexpired terms stand, in all respects, in the place of the Judge whose *term* they are elected or appointed to fill. Otherwise, it must result that all the Judges elected at the August election, 1878, must continue to receive the salary then fixed by law, that is to say, for Chancellor, Circuit and Criminal Judges, \$2,500. Whereas, Judges who were appointed or elected to fill vacancies that occur after the passage of the Act of 1879 will receive only \$2,000, and we have Judges of the same grade and performing the same services receiving different salaries.

This construction would be desirable in some respects, and would avoid the incongruity indicated, but would require a departure from the plain meaning of the words used. If the purpose of the framers of the constitution had been as indicated, it would have been easy to use language clearly expressing such intention, but the language is, that the compensation shall not be increased or diminished during the *time* for which they are elected. This obviously means during the time and not the *term* for which the Judge is elected. We are not at liberty to strain the language in order to reach a construction that may comport with our notions of justice to the particular Judge, or to avoid incongruous results. We must give effect to the clearly expressed intention, whatever may be the consequences.

Furthermore, looking to the reasons upon which

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this clause of the constitution was doubtless adopted it must be apparent that the object was to prevent the increase or diminishing of a Judge's salary *while he is in office*, so as to relieve him as far as possible from improper influences, and promote an independent discharge of his duties.

If the change takes place before the Judge is elected or appointed, the evils intended to be guarded against cannot well result as to him. He accepts the office with a knowledge of the salary as fixed, and no injustice is done him.

The language of the constitution is unambiguous, and its plain meaning must prevail.

It is not denied that the Act in terms applies to all Judges elected or appointed after its passage. We must hold, therefore, that Judge Horrigan's salary is only \$2,000, and the judgment of the Circuit Court will be reversed.

FREEMAN, J., delivered the following dissenting opinion :

The agreed case raises the question of the constitutionality of the Act of the Legislature of 1879, chap. 3, p. 4, which is as follows :

"That each Chancellor, Circuit and Criminal Judge, and Judges of Special Courts hereafter appointed or elected, shall be entitled to a salary of two thousand dollars per annum."

The 7th section of article 6th of our Constitution is, "the Judges of the Supreme or inferior Courts, shall. at stated times, receive a compensa-

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tion for their services, to be ascertained by law, which shall not be increased or diminished during the time for which they are elected." By section four of same article it is provided, after fixing the qualification of Judges, "his term of service shall be eight years." In case of vacancy by death or resignation, "the appointment or election to fill the vacancy, is only to be for the unexpired term." Section 5 of article 7.

Judge Horrigan was appointed to fill a vacancy by reason of the death of Judge Scruggs, who was elected in 1878, before the passage of the Act of 1879, and whose salary was \$2,500, which could not have been increased or diminished during his term of eight years.

The question is, whether the time for which an officer or Judge is appointed, shall be held to mean the term of office, that is the eight years and whether *time* in the last clause, shall be construed to mean term, and thus, during the *term* of eight years, the salary cannot be changed. as to all Judges elected for such term Judge Horrigan, filling but the unexpired term, claims to be protected, and entitled, by this clause of the Constitution, to the salary attached to the term of office, the remainder of which he is filling out. It may be so construed. Would it not be more in accord with the general purpose clearly indicated by the Constitution, that it should be so construed?

It certainly was not supposed by the Conven-

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tion that there should be during the same term. one set of officers of this grade, receiving one salary, another a different one. The language is. "The Judges of the Supreme or inferior Courts shall receive compensation for their services, to be ascertained by law, which compensation shall not be increased or diminished during the *time* for which they are elected."

All the Judges, for the period fixed, are to receive the same compensation, is clearly the idea of this provision. All are to receive it, the amount to be ascertained by law, that is, by a general law, operative on all alike. It certainly was not intended that a special law should be passed fixing the compensation of each class of Judges during the time for which the Judges were elected. They were all to be elected at the same time, and the term is to be eight years. If vacancy occur, the appointment is to be made to fill the unexpired *term*.

Would it be in accord with the intent of the Constitution, to enact that Judges, elected or appointed, say the first year after the regular election, should have, say \$2,500; those the second, \$2,000; the third, \$1,500, and so on, during the entire term?

Would not this be to classify and discriminate between the Judges of the same grade in a manner not contemplated by the Constitution? The difference in principle is not seen in the case supposed, and the case before us, for if it can be

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that the salary of Judges appointed or elected, during the same term, after the regular election, can be made different from others holding for the same period, then any number of grades of compensation may be fixed, and infinite confusion and incongruity be introduced, certainly contrary to the intent of the Convention.

If this article of the Constitution intends the compensation to be fixed by a general law, then it was intended that general law should fix the compensation of all the class at the same rate, during the same term. If it may be changed as to Judges elected or appointed after the general election, then it may be made different in amount during the time for every six months during the eight years. A construction that admits of such a result should not be followed, unless the language imperatively requires it. It does not, and the opposite may as fairly be the construction, from which no incongruity or confusion flows. Would not this be a result more nearly in accord with the purpose or intent of the convention? If so, it ought to be preferred. The intention, when fairly arrived at, is the end to be sought in all construction or interpretation.

The general policy of the State and uniform practice, before and since the constitution, may aid in arriving at the meaning of the language used. Uniformity of salary in the same grade of judicial officers has been the unbroken custom and usage from the foundation of the government to the pres-

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ent law. A construction favoring a change is one that only can be assumed as proper, when the language cannot be held to allow of a construction in accord with this usage, and it is clear it was intended to be changed. No such clear purpose is seen in the language used. In fact, we know no purpose to make such a change was intended.

In view of these considerations, we may well say that the true intent was, that compensation of Judges was to be fixed by a general law, before the commencement of their term of eight years, and during this time or term the compensation attached to the office should remain. Therefore, a Judge filling an unexpired term is to receive the compensation fixed at the beginning of the term which he fills. This would give uniformity in precise accord with past usage, and would be in accord with the intent of the convention, and at the same time do no violence to the language of the constitution.

For these and other reasons, I dissent from the opinion of the majority of the Court, in this case.

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B. J. WILLIAMS et al. v. BARTLETT, GOULD & BLAKEMORE.

1. **BILLS AND NOTES.** *Consideration. Mortgage. Rents.* Bartlett, Gould & Blakemore had a mortgage on land devised to W. W. Trigg, he being in possession; the time for payment having passed; W. W. Trigg sold and conveyed the land to Williams, with the assent of Bartlett, Gould & Blakemore, they releasing their mortgage, and receiving the notes given by the purchaser, secured by another deed of trust, having twenty-one months to run. The land was subject to the debts of the ancestor of W. W. Trigg, who had devised it to him. It was afterwards subjected to sale for their payment. The purchaser remained in possession up to the appropriation to the ancestor's debts, the rents amounting to as much or more than the notes given for the purchase. *Held*, on bill filed to enjoin the collection of the notes in the hands of Bartlett, Gould & Blakemore and their assignees, that the consideration paid by them was ample, in the loss of the rents, which they might have appropriated to their debt; that there was no failure of consideration on their part, and a recovery could be had on the notes.
2. **CHANCERY PLEADINGS AND PRACTICE.** *Endorser. Demand and notice.* That where an endorser wishes to defend in equity against his liability, for want of due notice, he must make such defense in his pleading, especially where the case has been conducted to a hearing, on the assumption of recognition of his liability being fixed on his part. He cannot for the first time raise this question under a reference, ordering a report as to the amount due to the holders of the notes.
3. **SAME. Same. Same.** Where notes endorsed have been enjoined from being collected by bill on the part of the maker and en-

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endorser, before due, the holder is excused from demand and notice to such endorser. It would be idle to demand what he has been forbidden to receive by such injunction.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

ESTES & ELLETT, METCALF & WALKER, GREER &
ADAMS and W. M. RANDOLPH for Complainants.

W. S. & J. R. FLIPPIN, E. M. HEARN and SMITH
& COLLIER for Defendants.

FREEMAN, J., delivered the opinion of the
Court.

The original bill in this case was filed September, 1870, by B. J. Williams and E. D. Massey. Its purpose was to enjoin certain suits brought on notes given by Williams, with Massey as endorser, in the Circuit Court of Tipton County, and to restrain the negotiation of other notes.

The main facts necessary to the understanding of the questions to be decided in this case are as follows:

John Trigg died in Shelby County about the year 1863, owning a large landed estate, both in Tennessee and other States. He devised his property to his children, and, among other things, a tract of land in Tipton County, of upwards of nine hundred acres, to W. W. Trigg, a son. It

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was thought by all parties, at the date of the transactions hereinafter mentioned, that the estate was amply solvent, and the devisees, after paying debts, would have a considerable estate.

In 1866 a bill was filed in the Chancery Court at Memphis by Nelson, the executor of John Trigg, to settle up the estate, pay the debts and execute the trusts of his office under the direction of that Court. In this bill it appeared that the indebtedness was probably about ninety thousand dollars, and it was charged that the real estate would have to be resorted to for the payment of the debts, the real estate in Tennessee being specifically pointed out, and a sale of so much as might be necessary to pay the debts, after taking proper accounts specifically sought by the bill. It seems that there was no suspicion up to this time that the estate would prove insolvent, but was supposed that a few of the most valuable and saleable pieces of property around and in the city of Memphis would be sufficient to discharge the indebtedness.

On the 15th of February, 1867, W. W. Trigg gave his four promissory notes, of five thousand dollars each, due on the 15th of February, 1868, to Bartlett, Gould & Blakemore, a firm of merchants in the city of Memphis, and at the same time gave them a conveyance of the tract of land devised by his father, lying in Tipton County, to secure these notes, the conveyance being directly to them, but subject to the condition that if he paid the above notes when they fell due, the con-

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veyance should be void, otherwise to remain full force and effect.

The notes were not paid, and the matter remained in this condition until March 27th, 1869. when complainant, Williams, contracted to buy said land at the sum of \$18,000, paying \$1,000 cash, giving his notes, twenty-six in number, due in nine and twenty-one months from date, with his son-in-law, Massey, as endorser, the notes being made payable to Massey, by him endorsed, handed to Trigg, and by him delivered to Bartlett, Gould & Blakemore, in the discharge of his debt to that extent.

This sale was negotiated with the assent and active concurrence of the firm who held the legal title to the land.

It was understood between all the parties that the firm were to receive the notes, and release their mortgage. In fact it was known that the firm was in debt, and pressed, and desired to realize the debt due them, and to use the notes received for the land in discharging their own debts. In view of this, and in order to enable them to do so more conveniently, the notes were made, part of them of \$550 each, and six, we believe, of \$1,000 each, due as above stated. At the same time Williams received a deed from Trigg for the land, and went into possession, but conveyed the same to Flippin in trust to secure the payment of the notes given for the purchase money. A part of these notes having been assigned

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by Bartlett, Gould & Co. to Walton, and suit brought on them in the Circuit Court of Tipton County, this bill was filed in 1870, as we have stated, to enjoin this suit.

It is proper to say in addition, that a receiver was ordered at an early stage of the proceeding and a report ordered as to the value of the rents, which were reported to be \$4,000 per annum, which report seems sustained by the proof.

By agreement of parties, Williams was permitted to continue in possession of the land, on giving bond for payment of \$3,000 per annum, and if he failed to give the bond the Clerk and Master was to take possession as such receiver. He continued to occupy the land and enjoy the profits, under this arrangement, until their appropriation for the debts of the ancestor, John Trigg.

The deed of trust to Flippin, given as we have said, to secure the land notes, postponed the sale of the land until the notes fell due, say twenty-one months. Under the mortgage held by Bartlett, Gould & Blakemore they had at this time the right of immediate foreclosure, and had had that right for some time, the condition having been broken, to-wit: The failure to pay the notes for \$20,000, which it was given to secure. Under these circumstances, certainly from the time of failure to pay, the mortgagee had the right to file his bill, and with or without a prayer to that effect, on showing the facts as they appear in the record, have a receiver appointed for the rents,

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and have secured such rents to be appropriated to the payment of his debt. See *Henshaw v. Wells*, 9 Hum., 581. The mortgagor in possession, it is said, in the above case, has but the right to possess the premises at will, in the strictest sense, and is not therefore entitled to notice to quit, and may be put out of possession by ejectment or other proper suit, either before or after default, if the mortgagee choose: *Ibid* 579; 4 Kent, 155.

It is clear in this case that the mortgagees, Bartlett, Gould & Blakemore, released this mortgage, with the incidental rights we have mentioned, on the consideration that they should have the notes, secured by the last deed of trust, and said notes were prepared, endorsed by Massey, and handed over to them in accordance with the understanding of all the parties at the time.

It is difficult on this aspect of the case, if not impossible, to say that this was not a valuable consideration, to support the transaction, so that they would hold these notes as *bona fide* purchasers, taken for value, certainly to the value of the advantage so released, which would have been, as it has turned out, the value of the rents until the appropriation of the land under the prior charge in favor of the creditors of John Trigg; this would be the case. We thus qualify the statement because of the fact that if the title was subject to the prior charge of John Trigg's debts in the hands of the purchaser, and of Flippin, it was equally so subject

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in the hands of Bartlett, Gould & Blakemore, and the release of the title in them was therefore diminished in value, so far as the legal title is concerned to that extent.

As to the question of improvements suggested by counsel, we know of no principle on which a mortgagor in possession could claim to set these off against the mortgagee or beneficiary under the deed of trust. This view is conclusive of the result in this case, as the land is not shown in this record to have been appropriated yet, though it has been done as stated by counsel, but this was not done for probably seven or eight years or more after the date of this transaction.

To make this view a little more distinct, assume that complainant is entitled to set off his damages by reason of the breach of the covenant against incumbrances, against these notes, and the land itself is lost to him. The notes due and the amount paid would thus be met and absorbed. But Bartlett, Gould & Blakemore had a mortgage from Trigg, conveying them the legal title to this land, which they were entitled to foreclose the day the sale was made to Williams. This entitled them to have the rents applied to the payment of their debt secured by the first mortgage. This right they released, and these notes secured by the second deed of trust to Flippin, were taken in the place of Trigg's liability on the first notes and mortgage. If these notes had not been substituted for the first, those notes might have been paid by

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an appropriation of the rents of that land. Williams gets these rents from that day up to the appropriation, which at \$3,000 per annum is more than the amount due from Trigg to these parties; while he has lost the legal title to the land, he has received from Bartlett, Gould & Blakemore, and they have been deprived of it by their release of their mortgage, the full value of these notes, and so the consideration paid by them for the notes, is full and ample, all of which has been received and enjoyed by Williams.

That the mortgagees were entitled to these rents there can be no question under the facts we have stated. The executor of John Trigg's estate could only have the land itself applied to payment of debts, and until such appropriation the heir or devisee was entitled to the rents, as we held in a case at Nashville, January, 1880. The mortgagee holding his title was equally entitled to this right, which was released by these mortgagees to Williams, and which he has enjoyed, and is a full consideration for these notes, in their hands or their assignees, and so nothing else in the case it must be decreed.

It is, however, insisted for Massey that he is discharged, as endorser, at least as to part of the notes for want of proper demand and notice to him of failure to pay on the part of the makers.

We do not think this defense can be made available in this case for several reasons.

First, No such question is presented by any

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pleading in the case, but the liability of both maker and endorser is distinctly recognized in the original and supplemental bills, and impliedly admitted in the answer to the cross bill, certainly no objection of this kind is suggested.

Second, By the original bill these notes were impounded and enjoined from being collected by the holders, that is, those not due. Massey, the endorser, is party complainant to this proceeding, by which the holders are inhibited from collecting or enforcing them. Having thus secured them from being enforced, the endorser is not entitled to require the idle ceremony of having them demanded, and notice of failure to pay on the part of the makers. The holder was enjoined from receiving the money if demanded, and he cannot be held bound to demand, for the benefit of the endorser, what that endorser had joined in forbidding him to receive.

As to the notes falling due before the injunction, they are recognized in the bill to have been protested, and no issue made at any stage of the case, as to regularity of notice. Under the case as found in this record, we do not think this question was before the Chancellor for adjudication, nor was it included in the order of reference, under which it was for the first time raised.

We need not go into any other features of the case as presented in the argument. It is clear there is nothing in the pleadings on which to base the claim for rescission, that is sustained by

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the proof. The only ground on which complainants might have had a standing in Court, is the breach of warranty against incumbrances and of seizin and this was not the theory of any of their pleading; is only an after thought of the ingenuous counsel who came into the case in this Court. That ground could only be good against an assignee, who had not paid value, and being an equitable set off, the holders are entitled to be repaid, the consideration passing from them, to-wit: the rents, and these rents are sufficient to pay and discharge the notes sued on, and the holders are entitled to recover on them on this ground.

There was no failure of consideration so far as these parties were concerned, whatever there might be as to the legal title to the land. A decree will be drawn in accord with this opinion. The costs will be paid by complainants.

Jones v. McKenna.

4L 630
6L 656

SAMUEL H. JONES et al. v. ROBERT MCKENNA.

1. CHANCERY PLEADING AND PRACTICE. *As to necessary parties.*
Quere, whether a mother who buys land, and causes the deed to be made to her in trust for the separate use of herself and children for life, and after her death to go to her children or the issue of such as may be dead, with the power of sale and re-investment reserved to her, sufficiently represents the children to make a sale of the land good against them under a bill filed for the enforcement of the lien reserved on the face of the deed for the payment of the purchase money?
2. SAME. *Remaindermen. Equitable subrogation.* If such a sale be declared void as to the remaindermen, because not made parties, the Court intending to sell and the purchaser to buy the entire estate, so much of the purchase money as was applied to the payment of the lien debts, with interest, as provided in the original contract, will be, as against the remaindermen, although infants, by way of equitable subrogation, charged in favor of the purchaser as a lien on the land, and the land subjected to the satisfaction thereof by sale.
3. SAME. *Revivor.* A suit may be revived under the Code, sec. 2355, by the infant heirs and successors of a deceased complainant, upon motion in their name by next friend.
4. SAME. *Decree. How set aside or impeached.* A decree by consent on behalf of infants cannot be set aside at a subsequent term upon motion or petition by them, nor can it be brought up by appeal. It can only be impeached by an original bill.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

SMITH & COLLIER, HARRIS & TURLNY, GANTT &
PATTERSON for Jones.

Jones v. McKenna.

METCALF & WALKER for McKenna.

COOPER, J., delivered the opinion of the Court.

On the 31st of July, 1865, Thomas Jones sold and conveyed to Sarah J. Jones, then the wife of Samuel H. Jones, the land in controversy in this case, reciting the consideration and the notes given therefor, five of which, for various amounts, aggregating over \$5,000, were made payable to third persons named, and expressly retaining a lien on the land for the payment of the purchase money.

The deed conveyed the land to "Mrs. Sarah J. Jones upon the trusts and limitations hereinafter mentioned, * * * to have and to hold the same to the said Sarah J. Jones for life, for the separate use and benefit of herself and children, and at her death to go to her children, or the issue of such child or children as may then be dead." The deed concludes: "Should it become necessary to make sale of said land in the opinion of Mrs. Jones for any reason satisfactory to herself, she is expressly empowered to sell the same and make title to the purchaser, but the proceeds are to be invested by her in other lands upon the trusts expressed in the deed.

On the 18th of August, 1867, J. C. P. Hammond, as the personal representative of one of the third persons to whom a purchase note was made payable, and the personal representatives of another of these persons, filed their bill against Samuel H.

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Jones and Sarah J. Jones, to subject the land to the satisfaction of the purchase money represented by said notes under the lien retained.

To this bill the holder of another of the notes was permitted to become a party complainant, and such proceedings were had that the amount due upon these demands severally was declared, and the land was ordered to be sold in satisfaction thereof.

At the sale made under this decree, Robert McKenna became the purchaser at \$7,200, and the money was paid into court, and paid out under its orders. There seems to have been a small surplus of about \$172, after paying such debts as were decreed to be liens on the land, and this surplus was paid to McKenna upon a debt of Sarah J. Jones to him, which, by consent of her counsel, seems to have been declared also to be a lien, although not one of the notes mentioned in the deed. The lien debt proper seems to have been a little over \$5,000.

Previous to the sale under the decree, an agreement was entered into by McKenna, afterwards reduced to writing and signed by him, by which, after reciting the sale and that the purchase was made for the payment of the lien debts proper, and also of a debt to a third person named, contracted upon the faith of Mrs. Jones' separate estate, and another debt due from her to him for about \$1,800, "it was agreed by and between said Sarah J. Jones and said McKenna, that the said

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Sarah J. Jones should have the right to redeem said land at any time within ten years, by paying the amount of said debts, including the amount due said McKenna, and by paying annually on the whole sum the interest at the rate of ten per cent. per annum, to begin from the 1st day of June, 1870, and the payment of which interest, as it matures at the end of each year, is to be paid promptly and without fail, and a failure to do so, at the end of any year, will at once cut off and bar the right of redemption, and make the title absolute in the said McKenna."

The interest not having been promptly paid under this agreement, McKenna obtained a writ of assistance to put him in possession of the land, and, on the 1st of March, 1873, Samuel H. Jones and Sarah J., his wife, filed their bill, enjoining the execution of said writ, setting out the agreement with McKenna, who is made a defendant, claiming that the purchase in accordance therewith created a mortgage, and asking that it be so decreed, and also decreed that complainant, Sarah J., has the right to redeem.

Pending this suit, on the 26th of December, 1873, Sarah J. Jones died. On the 30th of April, 1874, her death was suggested and admitted, and the suit revived, on motion, in the names of her children and heirs by Samuel H. Jones, their father and next friend, they being infants.

The cause was heard on the 24th of June, 1874, when the Chancellor decreed that the agree-

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ment did not constitute a mortgage, but only gave "a conditional right of redemption or re-purchase" upon the prompt payment of interest, and it appearing to the Court, by "admissions of all parties," that the annual payments had not been made, the Court adjudged the title to the land to be absolute in McKenna. "But," recites the decree, "inasmuch as said McKenna is willing, and does in open court consent, for the advantage and benefit of complainants, that said agreement may, for the purposes of this suit, be construed otherwise, upon condition that said land be now ordered to be sold without redemption for the payment of the amount due to him in said cause, with ten per cent. interest thereon; and all parties consenting thereto, the Court doth so order and decree." The Court then, from the papers in the former cause, "and the admission and consent of parties to the correctness thereof," ascertained the amount due McKenna to be \$10,531.51, and ordered the land to be sold in satisfaction thereof, unless paid within a given time. "By consent of parties" the sale was made free from the equity of redemption. To this decree the complainants, by their solicitors, give their consent in writing.

Under this decree the land was sold, and McKenna became the purchaser at \$8,000. On the 20th of November, 1874, the sale was confirmed, the title vested in McKenna and a writ of possession ordered to put him in possession of the land.

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On the 4th of December, 1874, the children of Sarah J. Jones, four of whom, being infants, appear by an adult sister as their next friend, and moved the Court to vacate the decree of the 20th of November, 1874, of the same term, which motion was continued for argument.

On the 12th of February, 1875, the motion was taken up and heard, and the Court vacated and annulled the decree of the 20th of November, 1874.

The decree then rendered proceeds: "And the Court being of the opinion that upon the death of Mrs. Sarah J. Jones, the subject matter involved in this cause ceased to exist, and that the cause ought then to have abated, and in law did abate, it is ordered that this cause do abate."

A bill of exceptions shows that on the hearing of this motion the affidavit of George C. Holmes was read by the children of Sarah J. Jones. No affidavit appears in the record, and the Clerk states that it was lost before enrollment. From this decree McKenna appealed.

On the 4th of August, 1875, Robert McKenna filed his bill against Samuel H. Jones, stating the foregoing facts, claiming the absolute title to the land by virtue of the proceedings in said causes, and asking that the bill be taken as a bill to quiet his title, and to remove the claim of the defendants as a cloud thereon. But if mistaken in his rights in this regard, that he be subrogated to the rights of the lien creditors whose debts

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were paid by the purchase money received from him under the first sale, and the land subjected to the satisfaction thereof by a sale on time free from the right of redemption.

Such proceedings were had in this cause that a final decree was rendered in favor of the complainant, the Court being of opinion that he acquired a good title to the land under his original purchase.

From this decree the defendants appealed.

The two cases of *Jones v. McKenna* and *McKenna v. Jones* are now before us separately, but have been heard and argued together. The stress of the argument submitted has been directed to the discussion of the validity of the title acquired under the sale in the Hammond case, the question turning upon the point whether Sarah J. Jones, as trustee and mother, so represented the interest of her children in the land as to make the decree binding on the children, who were no parties to the suit. The point is one of some nicety. For, while the general rule undoubtedly is, that in foreclosure suits the beneficiaries, as well as the trustees should be made parties, (*Osbourne v. Fallows*, 1 R. & M., 741; *Calverley v. Phelps*, 6 Mad., 229; *Clark v. Reyburn*, 8 Wall, 318), yet it has equally been the rule that a trustee may be invested with such powers as to make him the representative of the beneficiaries in all things relating to the trust property: *Bifield v. Taylor*, 1 Beat., 91; *Kerrison v. Stewart*, 98 U. S., 160; *Sweet v. Parker*, 7 C. E. Green, 453. And it is difficult to conceive of

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a stronger case of the right of representation than where the trustee is the purchaser of the property, the principal beneficiary and the mother of the other beneficiaries, who are mere objects of her bounty, the legal title and power of sale being vested in her, and the debt for which the land is sought to be subjected being for the purchase money of the land itself.

Upon a critical examination of the record we find it impossible to decide the point in one of the cases, and unnecessary in the other. The bill of Jones and wife *v. McKenna* was filed to enjoin the execution of a writ of possession under the sale in the first case, and for relief upon the ground that at the sale there was an agreement, subsequently reduced to writing, by which McKenna agreed to purchase and hold the property in mortgage, subject to redemption upon long time. McKenna admitted the agreement, but insisted that it was only a concession of the right to repurchase on certain terms. The mother died, and the suit was revived in the name of the children, and proceeded to a decree. In that decree, although the Court construed the contract as contended for by the defendant, yet the defendant waived the decision in his favor and agreed that the agreement might be treated as a mortgage, for the purposes of that suit, upon condition of an immediate sale, and, thereupon, by consent of parties, a final decree was rendered ascertaining McKenna's debt, and ordering a sale. The sale was made

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and reported to a subsequent term of the Court, and confirmed. At the same term a motion was made by the children of Sarah J. Jones to vacate the decree confirming the sale, which motion was afterwards sustained, and McKenna appealed.

The record discloses no ground for this action of the learned Chancellor.

The sale seems to have been in strict conformity with the decree under which it was made and the confirmation proper.

As long as the decree of the former term remained in full force, it was the duty of the Court to execute it. Having been rendered at a previous term the Chancellor had no power over it. His Honor seems to have thought that because the agreement, on which the suit was based, was, in his opinion, a contract for a strict right to repurchase not complied with, the suit necessarily abated. But in this he was clearly mistaken.

The children had the right to revive the suit to test that question precisely as they would have had the right to have exhibited a bill upon the agreement itself, if their mother had died before commencing a suit upon it. And if the Chancellor made a decree adverse to their rights, they had the option to appeal to this Court, and we might have differed with him in the construction of the contract, or, as was done, compromise the litigation by entering into a consent decree: *Wall v. Bushby*, 1 Bro. C. C. 484.

That decree having been sanctioned by the

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Court, by passing it, could not be set aside upon motion or petition: *Harrison v. Rumsey*, 2 Ves. 488; *Coster v. Clarke*, 3 Edw. Ch. 428; *Decartiers v. LaForge*, 1 Paige, 574. Nor is the decree before us now, for no appeal lies from a decree by consent: *Williams v. Neil*, 4 Heis., 279; *Toder v. Sansam*, 7 Bro. P. C. 244. The only remedy, if the party did not really consent, is by an original bill in the nature of a bill of review: *Jones v. Williamson*, 5 Cold., 371; *Bradish v. Gee*, Amb., 229; *Richmond v. Tayleur*, 1 P. W., 734.

Under the Code, Sec. 2855, a suit may be revived in the name of infants by their next friend, by motion, in the same way as it might be revived by bill of revivor by next friend. If any of them were of age, the fact does not appear in the record of that case, nor, if it did, would the form of the entry of revivor affect its validity if the adult children did in fact appear and consent to the final decree. As the record comes before us, the Chancellor erred in setting aside the decree of confirmation, and his order in that regard must be reversed and the decree of confirmation affirmed with costs.

In this view, if McKenna elects to take the decree suggested, the final decree in the case of McKenna v. Jones, which is based on the validity of the sale in the Hammond case, must be reversed, and a decree rendered here in his favor based upon the consent decree in the case of Jones v. McKenna. For McKenna has, in his bill, set out

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the facts touching both of the previous suits, and embodied the records of those cases in the record of this case. He admits in this bill that he did enter into the written agreement which forms the basis of the bill of Jones and wife, and can claim only such rights as he acquired in the latter suit. The modification of the decree may throw the costs of this Court upon him.

In the order of revivor as it appears in the record of the case of Jones v. McKenna, the name of one of the children does not appear. It may be, too, that some of the children were then of age, and did not authorize the revivor. No authority was necessary from the infants; any person, and certainly their father, acting in good faith, might revive for them. But what ground might be shown by the original bill for setting aside the consent decree we cannot know, and the decrees above suggested would not affect the right of the children to file such a bill, if there be any ground for relief in that form. It is clearly not to the interest of McKenna to begin another ten years round of litigation, if there is a plausible opening for it. For these reasons, if he, or those who now represent him, will waive the benefit of the decrees suggested, and take a decree, under the last bill, for the amount of money paid by him at the first sale, which went in extinguishment of the lien debts, with interest thereon at the rate fixed by contract, he may do so, and sell the land at once, on time free from the right to redeem, in

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satisfaction thereof, so as to have the sale confirmed at the present term. In that event, the entire costs of both causes may be paid out of the proceeds of sale.

It is the settled law of this State, that where the property of infants has been sold under judicial proceedings which are afterwards declared void because they were not parties, whether the sale was made to pay debts of the ancestor or directly for the benefit of the infants, the infants will be required to refund to the purchaser at the judicial sale so much of the purchase money as was received by them or appropriated in the payment of debts which were a lien on the property: *Elliott v. Cochran*, 2 Sneed, 468; *Arrington v. Grissom*, 1 Cold., 525; *Martin v. Turner*, 2 Heis., 889, *Campbell v. Bryant*, 1 Leg. Rep., 137.

These decisions rest upon a principle of equity so obvious as to commend them to our sense of justice, outside of their binding authority as precedents. They fully sustain the relief we have suggested subject to the election of the party. The Court in the original case, intended to sell, and the purchaser supposed he was buying the entire estate in the land. If he failed to do so, it was because the infant children of the holder of the legal title were not parties. The case falls precisely within the authorities.

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SAMUEL H. JONES v. ROBERT McKENNA.

BANKRUPTCY. *Assignee, rights of.* Ordinarily, upon the fact being made known to the Court before final decree, and it not appearing that there are conflicting rights, it may be that an assignee in bankruptcy will be allowed to take the place of the bankrupt; but if he postpones the application until after the final determination, it becomes a matter of favor and not of right.

FROM SHELBY.

COOPER, J. delivered the opinion of the Court.

In these cases Robert McKenna, the successful litigant, was permitted to elect to take the property in dispute under the agreed decree in the first case, or, upon a waiver of his rights under that decree, to take a decree in the second case for money, and for a sale of the property in satisfaction thereof.

It now appears, by statements of counsel, that McKenna had conveyed away his interest in the land to a third person, under whom, by sub-conveyance, McKenna's daughter now claims the land, and that in 1878 McKenna was declared a bankrupt, and his property conveyed to an assignee. The daughter, through the nominal plaintiff, elects to take the land under the agreed decree.

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The assignee moves to be made a party complainant, and elects to take the money decree.

Pending this quarrel, the other litigants insist that as "it now appears that McKenna had conveyed the property before suit" was brought, they ought to be dismissed with costs.

Clearly, this Court cannot go outside of the record to decide upon the rights of the parties. Ordinarily, upon the fact being made known to the Court before final decree, and it not appearing that there are conflicting rights, it may be that an assignee in bankruptcy will be allowed to take the place of the bankrupt. But if he postpones the application until after the final hearing and determination of rights, it becomes a matter of favor, not of right. For, if brought forward sooner, persons having adverse claims would have been given an opportunity of asserting them before the title of the assignee could become vested. Clearly, too, no suggestion of the situation of the title to the land can affect an agreed decree.

Under the circumstances, we see no course left except to withdraw the election given by the opinion of this Court, and allow a decree to be entered declaring the legal rights of the parties as they appear of record.

The application of the assignee will be refused, but without prejudice to his right to assert his title in such mode as he may be advised.

Ordered accordingly.

Home Insurance Company v. Taxing District.

4L 644
 4L 353
 15L 638
 1pi 495
 4pi 140

4L 644
 6110 611
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 116 514
 116 515

HOME INSURANCE CO. v. TAXING DISTRICT.

1. **CONSTITUTIONAL LAW.** *Repeal by Implication.* The Act of 1875 ch. 109, provided for the payment to the State of a prescribed tax by foreign insurance companies for the privilege of doing business in this State, "which shall be in lieu of all other taxes." By the act of 1879, ch. 84, sec. 7, sub-sec. 53, an additional tax for the benefit of the Taxing District was laid on the same business. *Held*, that the latter act was valid.
2. **SAME. Same.** The provision of the Constitution of 1870, Art. 2, sec. 17, that, "All acts which repeal, revive or amend former laws shall recite in their caption or otherwise the title or substance of the law repealed, revived or amended," does not apply to acts which, by their positive provisions, operate a repeal of previous acts by necessary implication.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
 W. W. McDOWELL, Ch.

U. W. MILLER for Complainant.

C. W. HEISKELL for Defendant.

COOPER, J., delivered the opinion of the Court.

This is an agreed case to test the liability of foreign insurance companies doing business in the Taxing District of Shelby County to pay a privilege tax to the municipality. The Court held them liable, and they have appealed.

By the Act of 1879, chap. 84, sec. 7, sub-sec.

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58, a tax for the benefit of the Taxing District, of \$200, payable quarterly in advance each year, is directly laid "upon the privilege of opening or establishing an insurance office or agency for the insurance of fire, life or accident, in the Taxing District, for companies not chartered by the laws of the State of Tennessee." By the Act of 1875, chap. 109, entitled "An Act to regulate the business of fire, and all except life, insurance companies," it is provided by sec. 8, that every company organized for any of the purposes named in the Act, not incorporated under the laws of the State, shall report semi-annually the premiums received on policies issued in this State, and, at the same time, pay into the treasury of the State the sum of \$2.50 upon each one hundred dollars of premiums so ascertained, "*which shall be in lieu of all other taxes.*"

The companies joining in the agreed case fall within the provisions of the Act of 1875, and have paid the tax as therein prescribed, and claim exemption from the subsequent taxation of the Act of 1879, by reason of the limitation in the clause cited, which, they insist, is still in full force.

It has been held by this Court that a provision in the charter of an insurance company in this State for the payment to the State of a specific annual tax, "*which shall be in lieu of all other taxes,*" will protect the company from further taxation by the State or any municipal corporation: *Memphis v. Hernando Insurance Co.*, 6 Bax.,

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527. It has also been held that the provision of the Act of 1875, chap. 109, sec. 8, above quoted, stipulating that the payment of the specified tax "shall be in lieu of all other taxes," equally protected the companies from municipal taxation: *Memphis v. Foreign Insurance Cos.*, MSS. opinion at Jackson. It was conceded, however, in the latter case, that the provision of the Act, being only a privilege by law, not a contract by charter, could of course be repealed.

The Act of 1879 does, by the section cited above, undertake to levy an additional tax. The companies resist the collection of such tax upon the ground that the limitation protects them therefrom.

If the Act of 1875 had simply provided for the payment of the specified tax to the State, omitting the words, "which shall be in lieu of all other taxes," the right of the Legislature to levy the new tax would have been beyond doubt. For, in that event, the legislation would have been the exercise of inherent power, not limited by contract, and the two acts might well stand together. It is equally clear that if our State Constitution contained no provision on the subject, the validity of the subsequent legislation would not be affected by the use in the previous Act of the words, "which shall be in lieu of all other taxes." For, these words being in a general law not creating a contract, the Legislature might repeal them directly or by implication. The Constitution of

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1870 does, however, contain this clause in Art. 2, sec. 17: "All acts which repeal, revive or amend former laws, shall recite in their caption or otherwise the title or substance of the law repealed, revived or amended."

The argument on behalf of the companies is that the Act of 1879, to be operative in the levying of additional taxes on them, must be held to repeal the words, "which shall be in lieu of all other taxes" of the Act of 1875, and is to that extent, unconstitutional, because it neither recites in its caption or otherwise the title or substance of the law repealed.

The words relied on, as we have seen, do not amount to a contract, nor limit the power of subsequent Legislatures. They should be read as if the clause was written thus: "which shall be in lieu of all other taxes until the Legislature imposes other taxes." For that is what in legal effect they mean. In this view, nothing was repealed by the subsequent legislation, the clause in controversy being mere surplusage, and both acts remaining in full force.

If this construction be inadmissible, the second Act is incompatible with the first, and does repeal it by necessary implication. The question in this view is squarely raised, whether implied repeals are within the purview of the constitutional provision. It has not, heretofore, been deliberately considered and determined by the Court, although there have been expressions of opinion on the

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point in cases in which its decision was, perhaps, not absolutely demanded: *State ex rel. v. Gaines*, 1 Lea, 734; *McGee v. State*, 2 Lea, 625; *State ex rel. v. McConnell*, 3 Lea, 332.

The present case, although not absolutely requiring its solution, has been selected in connection with another case in which the question is directly raised, for its discussion and determination.

Strictly speaking, a new statute does not repeal an old statute, however inconsistent with it. It is a mere form of expressing the result to say that the one repeals the other by implication. The prior act is not repealed, but rendered inoperative. And this is made plain by the fact that a direct repeal of the latter act, without any reference to the former, will, by a rule of the common law, give efficacy to the former. It was precisely because the old act never was repealed that it thereby became operative. It is a convenient, though inaccurate use of language to say that the new law repeals the old, and that the repeal of the new law revives the old. More properly the new act is an obstacle to the operation of the old act, which obstacle is removed by its repeal. It may well be doubted, therefore, whether a repeal by implication falls within the letter of the Constitution. It has usually been considered as if it did.

The question, in this view, is not one altogether of first impression. Several of the State Constitutions contain similar provisions; that is, provisions designed for the same purpose, some of

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them couched in stronger language. A common provision in many of these Constitutions is thus worded: "No act shall ever be revived or amended by mere reference to its title, but the act revived or section amended shall be set forth or published at full length." Cooley Const. Lim., p. 151, n. 1.

"It has been uniformly held," says Judge Cooley, "that statutes which amend others by implication are not within these constitutional provisions, and that it is not necessary that they even refer to the acts or sections which by implication they amend." He cites *Spencer v. State*, 5 Ind., 41; *Branham v. Lang*, 16 Ind., 481; *People v. Mahoney*, 18 Mich., 581; *Lehman v. McBride*, 15 Ohio, N. S., 593.

This conclusion has been reached partly from a consideration of the purpose for which the constitutional provision was adopted, and partly from the argument, *ab inconvenienti*, that a contrary decision would render legislation well nigh impossible. The first of these reasons, every Judge knows, is one which uniformly influences the judicial construction of statutes, where the meaning is at all doubtful. The evil intended to be remedied is a most potent factor in ascertaining the legislative will. It should have even greater weight in construing the work of a Constitutional Convention. For the language of a Constitution must necessarily be very general, admitting often of a broader sense than was meant to be conveyed. Error in the former case is, moreover, much less injurious, and more easily corrected than in the latter. And in

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either case, whenever the statute or constitutional provision undertakes to limit the power of the political department, every intendment should be in favor of that department. A doubt, as has often been said by the courts in relation to the great prerogative of legislation, should inure to the benefit of the Government.

The evil which led to the adoption of the constitutional provisions under consideration was, undoubtedly, the passing of laws without the members of the Legislature being fully advised of what they were doing. "The mischief designed to be remedied," says Judge Cooley, "was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty of making the necessary examination and comparison, failed to become apprised of the change made in the laws:" *People v. Mahoney*, 13 Mich., 455. The same is equally true of repealing statutes which fail to call the attention of the Legislature to the substance of the act repealed. The evil, it will be noticed, only applies to statutes which purport to repeal, revive or amend. No such evil can follow direct and positive legislation, which precisely because it is positive, repeals by implication previous legislation. For, in such case, the Legislature of course know what they propose to pass into a law, and intend that it shall be the law, whatever may have been previously enacted. "The very fact," says the Supreme Court

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of Maryland, "of establishing a particular rule of conduct for the public pre-supposes an intention on the part of the Legislature that a contrary rule to that which previously existed should prevail, and therefore the enactment of one law is as much a repeal of all inconsistent laws, as if the inconsistent laws had been repealed by express words:" 7 Md. 151, 159. Not the least possible danger can arise from a repeal by implication. For such a repeal is not favored nor admissible unless the positive provisions of the new law are utterly irreconcilable with the old law, thus unmistakably showing to the satisfaction of the judiciary that the repeal was intended.

On the other hand, the evils of a different construction of the constitutional provision are obvious and striking. It would result in turning what was intended to prevent unadvised legislation into a barrier to all legislation, and a certain snare to the legislator. "It would render," says the Supreme Court of Maryland, "many wholesome laws wholly inoperative, because of the inability or neglect of members to search thoroughly the statute books for laws which might be inconsistent or repugnant, a work of so great difficulty as to amount almost to an impossibility:" 7 Md., 159. The difficulty of determining the effect of a new statute of a general nature on the pre-existing system is notoriously great. Time alone, and the practical application of the new law to the varying phases of actual cases can show the ultimate results. To

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require from our legislators in advance what the wisest lawyer or judge would find a hopeless task upon serious study would indeed go far to render legislation impossible. Nor would this be the greatest evil. It would often happen, after a new statute had been acted on and treated as valid for years, that some old statutory provision would be discovered which would annul it *ab initio*.

That the constitutional provision under consideration does not apply to repeals by implication seems to be sustained by reason, as it certainly is by authority.

The Chancellor's decree must be affirmed with costs.

FREEMAN, J., delivered the following dissenting opinion.

The question in this case is, whether an existing statute can be repealed under our present constitution without complying with the last clause sec. 17 of Art. 2, of that instrument. In other words, whether a statute may be repealed by implication as well as by direct reference, as required? I think this is the real question. The clause of the constitution is, "*all acts which repeal, revive or amend former laws, shall recite in their caption, or otherwise, the title or substance of the law repealed, revived or amended.*"

What is the plain meaning of this language, and from this, what the purpose of the convention in its adoption, is the question to be decided.

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When that meaning is fairly ascertained the duty is one nobody questions, abstractly at least, on the part of this Court, to enforce it. It is true, we must arrive at that meaning by the usual and well-known rules of interpretation, one of which is to look at the evils intended to be remedied, and then read the language in the light of this, solely with the purpose of getting at the purpose of the enactment. The language used, however, is to be looked to as primarily expressing this meaning. When this is ascertained it must control.

In the language of Chief Justice Marshall, 4 Wh., 202 and 203, "Although the spirit of an instrument, especially of a constitution is to be respected, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide shall be exempted from its operation, where words conflict with each other, where different clauses of an instrument bear on each other, and would be inconsistent, unless the natural and common import of the words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the

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absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application." I take it, this statement of the principle that should guide courts in expounding the constitution, as given by the great Chief Justice in the above extract, will be conceded by all to be substantially sound.

What is the plain meaning of the language? What its natural import? What the fair interpretation? To give effect to the intent of the law-maker, in case of a law, and of the people, in adopting a constitution, is the object of all construction or interpretation. But that intent is to be found in the instrument itself, and says Judge Cooley, Const. Lim., p. 54. "It is to be presumed that language has been employed with sufficient precision to convey it, and unless examination demonstrates that presumption does not hold good in the particular case, nothing will remain but to enforce it." *Possible* or even *probable* meanings, when one is plainly declared in the instrument itself, the courts are not at liberty to search for elsewhere: *Ibid*, 55-56.

The framers of the constitution and the people who adopted it must be understood to have employed words in their natural sense, and to have understood what they meant: *Gibbons v. Ogden*, 9 W., 188: Cooley, 58-59.

In the light of these obvious and unquestioned

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rules of exposition, let us look at the language used, and find its meaning.

All acts which repeal former laws, *shall* recite in their caption, or otherwise, the title or substance of the law repealed. I quote the language referring to repeals, so as to make its bearing more distinct, leaving out the other words at present, with reference to reviving or amending laws.

Now, what is the natural sense of the language used is the first question. We must assume a knowledge on the part of the convention of what everybody engaged in framing a constitution may fairly be expected to know, that laws might be repealed in two ways, one by a law specifically enacting that the unnecessary or obnoxious law is hereby repealed, or by indirection or implication, by passing a law on the same subject inconsistent with the former law, so that the two enactments conflict, and both cannot stand together. Each of these modes of repealing a statute were well-known, and the one as well as the other. We take this as a fact would be conceded.

Now, is it not fair to assume, that with this knowledge, the convention, when they provided how laws should be repealed, and how *all* laws should be repealed, had in view the long established and equally well-known means by which this could be done, and as they knew would be done in the future? Certainly this is a fair assumption, unless they had chosen to discriminate between the two modes, and provided that it

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should be done, in the one case under certain regulations, and in the other under different ones; or in the latter case should be subject to no additional regulation, but remain as then permitted.

Now, the theory by which implied repeals of statutes must be sustained under the constitution as it stands, involves the maintenance of the proposition, that such difference is provided for, or can be found in a proper interpretation or construction of the language used by the convention. If such difference can be fairly made out by any legitimate interpretation of the language used, or construction to be arrived at by knowledge of the end to be attained, as throwing light on its meaning then we cheerfully yield to such a conclusion. But this must be done, you must recite in the caption or title of the repealing law, or otherwise, either the title of the law repealed, or the substance of such law so repealed. This is as plain as language can make it. If you enact a law that repeals another statute, you must recite in the one way or the other, either the one thing or the other, that is the title or the substance of the Act repealed, or else it cannot be repealed. This is what is said in the plainest possible terms.

But it is insisted that the language only means that such laws as specifically or directly repeal former laws, shall be so referred to, but has no application to laws that repeal other laws by necessary implication.

Let us see if such an intent can be gathered

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from the language used, without resorting to ingenuity rather than the words used. It is *all acts which repeal*, not such laws as are directly purposed to repeal, but all acts which do in fact repeal former laws, shall conform to this requirement. The only question is, does an act repeal a former law? If so, then the title or substance of the law repealed must be recited in its caption or otherwise. Now, this must apply to a law repealing by necessary implication, unless we can find something in this section itself, or in some other part of the constitution, that qualifies its meaning. There is nothing in the section to do this; certainly nothing in any other clause of the instrument having the slightest bearing on the question. We can only say it does not apply to implied repeals, as a matter of interpretation or construction, by holding that the word "all" can be restrained or restricted in its meaning, to a part, and that probably the smaller part of the subject to which it refers. If the word *all* can ever be contracted into the meaning that it refers only to a *part*, or less than the whole, then the view sought to be maintained can be found it, in otherwise not.

It seems to me that the very statement of the proposition contended for necessarily involves the reply to it. It is, that a law may be repealed by the enactment of another law by the Legislature, without mentioning or reciting, either in the caption or otherwise, the title or substance of

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the law so repealed. You have but to set over against this proposition the language of the constitution, that *all* acts which repeal *shall* recite in their caption or otherwise, the title or substance of the law repealed, to see that the one proposition is as distinctly and definitely antagonistic to the other as our language will permit. The proposition asserted in the language of the constitution is, you cannot. So that after all it is but the question, which shall prevail, the constitution or the exposition contended for?

We think this statement of the proposition, by the side of the language of the constitution is the most conclusive answer that can be made to it. It is impossible to affirm the one without contradicting the other.

The language of the constitution, in order to sustain the other view, would have to be qualified about as follows: All laws, except such as repeal laws by implication, shall recite, etc. But would not this be to interpolate upon the clause by construction, an additional element of a most important character? Why not as well say, except such laws as may by the courts be deemed useful or wise, or such as should properly be enacted? or rather, to put an illustration more directly in the line of argument by which the opposite view is maintained, except such laws as we can see the Legislature clearly understood, or where the meaning and purpose is clearly expressed? But would not this be constitution making instead of exposi-

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sition of one as made? If it had been so designed it would have been easy for the convention to have said so.

That the language includes all modes of repeal, we believe is not denied. Now, on what principle are we to assume that the convention used this general language to express a limited meaning contrary to the natural sense of the terms?

To use the language quoted from Chief Justice Marshal, "It would be dangerous in the extreme to infer from *extrinsic* circumstances that a case for which the words of the instrument expressly provide shall be exempted from its operation." Yet, is it not precisely by this process, and by no other, that the opposite view which we combat is maintained? Is it not by insisting upon the argument from inconvenience or embarrassment to the Legislature, that the language is sought to be restricted in its application and is not this extrinsic circumstance used to sustain the inference, that a case certainly provided for by the language clearly embraced in it, shall be exempted from its operation? If so, the principle stated, recognized and approved by this Court, and one, as we think, of undoubted soundness, must be set aside, and its opposite adopted, which is, that notwithstanding the language is clear and unmistakable, because of assumed difficulties in its application, we must hold it does not mean what it says, but something else. On this principle, it seems to us, the constitution can have no fixed meaning, but may and

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will be made as variable as the assumed exigencies of the Legislature or society may make it, the very evil intended to be met by the adoption of written constitutions, that the supreme law of the land should remain permanently fixed until changed by the power that ordained it.

We must also assume the convention did not know that laws might be repealed in two ways, or else, that with a full knowledge of this, it adopted language that included all ways of repeal, with the distinct purpose, that only one should be regulated. Unless this is so, then the construction contended for cannot be maintained, for all admit that the purpose or intent shall be carried out. To assume the convention used language which included and regulated, in its plain meaning, all ways known of repealing a law, intending thereby to confine it to only one mode of repeal, is to challenge their intelligence in the use of language, and to assume that they did so without knowing the meaning and force of the words used, is equally to infringe upon their intelligence; a construction that goes upon either view must be essentially erroneous.

But upon what principle can we say that in view of the evils intended to be remedied, the meaning of the language is to be restricted to direct repeals?

The evils are thus stated with reference to amendments and revisions of statutes and this general subject, by Judge Cooley, quoting from

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People v. Mahoney, 18 Mich. R., 497; Const. Lim., p. 150: "The mischief designed to be remedied was the enactment of amendatory, and we add, repealing statutes, in terms so blind that the legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made."

The object then was, that when a law was repealed or amended, it should be known and announced what law was to be amended or repealed. To effect this purpose, so that the Legislature and the public should know or have their attention called directly to the source of knowledge, it is required that *all* acts which repeal, revive or amend former laws, shall recite in their caption or otherwise the title or substance of the law repealed, revived or amended."

Now let us deal fairly with this question. Does not a law, directly repealing a former law, of necessity, by the very nature of the thing to be done, more definitely carry this desirable knowledge to the body enacting it, than in the case of implied repeals? In the case of direct repeal, you are compelled to refer to the law repealed in terms more or less specific, in order to identify it as the object of the enactment. It would fail of its object entirely if it failed to do this, and no one could tell what it was to operate on. Whenever you make it effective as a law repealing another

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law, you are compelled to give that law so repealed, identification; and when this is done, the source of knowledge is pointed out, so that it may be known, probably as effectually as is done in most cases by reference to the title. So, that if this was all the evil, it could not, in the nature of the subject, exist to a very great extent in this aspect of the question.

But in case of implied repeals, where the result is produced by comparison of the matter of the last law with the matter of former laws on the same subject, you repeal, without anything whatever on the face of the law to guide you as to how many statutes are swept away. The Legislature, courts and people in this case are left to their knowledge of the general subject, and of all the statutes on the subject, in order to know what has been done, or is being done, with not a hint from the face of the enactment to guide them, or to suggest the sources of knowledge on the subject. Now, if the evils be as stated, surely the greater need was that this provision should apply to repeals by implication rather than to statutes directly repealing another. In the one case, *ex necessitate*, a reference to the law must be made, more or less definite, certainly so as to identify it; in the other case the statutes can be repealed without such reference, and give no indication whatever as to what is done, and it can only be arrived at by comparison of the last act, with all pre-existent statutes on the subject, with

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memory and knowledge alone to guide in the search for them.

Ingenuous answers may be made to this by saying, formerly a law might have been repealed by reference to the chapter of the statute book, and this would have been very indefinite, or to the title of an act, and these might give no indication of what it contained. Concede this even, and yet this would point more directly to the law repealed than the principle of implied repeals contended for, as there would be a reference to the law so distinct in this that it could readily be referred to, the source of knowledge is pointed out, it may be not very clearly, it is true, but in the case of implied repeals, even this much is not done, but the Legislature is left to depend entirely upon its knowledge of the previous statute, or to grope in the dark for information with no guide at all.

On the view maintained, a law not mentioning or referring to a law, may repeal it by implication, while one purporting to do so, with defective recital, would be void.

But it is said when you enact affirmative matter all know what they are voting for, or may know, and so they know in every case of repeal, revivor or amendment. They read or hear read the entire matter of the bill, in the one case as well as the other. But knowledge of the affirmative matter of a bill is not what is involved. It is what laws are repealed, revived or amended,

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that are required to be referred to, and you are further from this in the case of implied repeals of necessity, than in the case of a direct repeal, containing any reference whatever to the law repealed or amended, however indefinite, so that it is clear enough to identify the law on which it is intended to operate.

We are totally unable to see [the force of the argument attempted to be drawn from the assumed evil to be remedied. On the contrary, we think it is unmistakably in favor, as far as it can go, almost conclusive in favor of the opposite conclusion than that for which it is presented. Certainly, in connection with the clear meaning of the language, this argument gives all its real weight in favor of the rule we maintain.

The argument, from inconvenience, we frankly say, has but little weight with us in any way. We think a sound policy is in favor of the construction we have given this clause of the Constitution.

The idea that a Legislature cannot comply with this plain rule of the Constitution, must rest on the assumption of defect of intelligence in that body, an assumption not respectful to make. If true, then it is a matter of the most vital importance to the State, that every rule of the Constitution that tends to create a demand for higher intelligence in this body shall be sternly enforced. If the rule of construction adopted shall even tend to give the ablest and best trained intellects of

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that body an influence that shall be more controlling, it is one that should be unflinchingly maintained.

That every bill which is to repeal, amend or revive another law, should refer to that law, either by title or by substance, compels the member preparing it to look into the law repealed, revived or amended, and know what it contains, or else he will fail of his purpose. If he cannot do this, he will be compelled to rely on some man of more intelligence to do this for him in order to put his law in proper form to meet the requirement of this article of the Constitution. In either case the desirable end is attained, and the existent law is scanned critically, and the remedy understandingly applied. Believing this worth effecting, and the views herein laid down tend in this direction, it is deemed vitally important they shall be maintained.

As to the difficulty of complying with the requirement, they are not seen to exist in fact when the matter is practically looked at. It can be no great hardship when a bill is to be enacted that changes the existent law, that a legislative body should be required to know what the law at the time is which is to be overturned. If their attention is called to it by reference to its title or substance, it may be, in many cases, it will be found the old law is the better, or the proposed amendment not desirable. At any rate it can do no harm that it shall be known before it is de-

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stroyed. The work will, at least, be more intelligently done.

We have seen no case yet where the Constitution may not readily be complied with. We have but to insist on a compliance with the Constitution, and it must be done, or the bills will not become law, and if no other benefit accrues to the country, we will be relieved of hasty and ill-understood legislation.

We have no hesitation in maintaining it to be the sounder policy to bring the legislator up to the Constitution, rather than lower the Constitution, on the implied assumption of a lower standard of intelligence in the legislative body. To act on the one principle, we think, tends to bring that body up to the higher standard; while the other view tends to increase the evil, if it exists, by permitting such loose legislation, as the lower standard of intelligence, is competent, to prepare and enact. We do see, as we think, that any policy based on the assumption of a want of the highest intelligence in the Legislature, and that shall lower the requirement for usefulness on any such principles, tends to produce the evil implied. If this be so, public policy and the best interest of the State demands the opposite rule to be enforced.

The authorities cited on this question, Cooley's Const. Lim., p. 150, in which the rule discussed is held not applicable to revisions or amendments, do not have weight or bearing on this question.

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They are opinions under a clause of the Constitution of Michigan and other States, which is, that "no law shall be revised, altered or amended by reference to its title only, but the act revised, and the section or sections amended shall be re-enacted and published at length. It is in reference to such a provision as this that evils and embarrassments are pointed out by Judge Cooley, citing his opinion in *People v. Mahoney*, 18 Mich., 497, making it necessary, as he says, to give a reasonable construction to the act, so as not to include the case of an implied amendment resulting from an affirmative and definite and independent law, amending a former provision of law on the same subject, or qualifying it. He says: "If you are to re-enact and re-publish the various laws relating to all the subjects modified, we shall find before the act is completed that it not only embraces a large portion of the general laws of the State, but also, that it becomes obnoxious to the other provision referred to, as embracing a large number of subjects, only one of which can be embraced by its title."

But this has no application under our Constitution. The laws repealed are not to be re-enacted or published, so as to encumber the statute book or lead to confusion, but only to be referred to by their title or substance, a provision easily complied with, not encumbering either the title or body of the act.

To use this authority in support of the rule

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now under discussion is, as we think, a clear misapplication of the principle announced. To avoid a construction that would produce results such as are stated, might be justified in the case stated by Judge Cooley; but to cite this as authority, in opposition to a rule that produces no such results, where no such evils are found, is illogical, and shows the principle has no application and gives no support to the view for which it is cited. No re-enactment or re-publication of the statute repealed is required by our Constitution, consequently a construction applicable to a Constitution having such a requirement, and based on it, is foreign to the matter in hand, and furnishes no aid in its solution. Other cases are cited, but we do not think their reasoning satisfactory. If we are to depart from the meaning of the language of the Constitution on the idea of inconvenience, or of public policy, it is well to look for a moment to see how far the principle may lead, and whether the policy of this departure is justifiable or sound.

The argument from inconvenience is always dangerous, and can never be rightly followed, except in a case where the inconvenience is such that it would show that the convention did not intend what the language they have used literally implies, as where the provision would be impracticable, and such as could not with reasonable effort be carried out in practice. Otherwise we may be making a Constitution based on *our* notions of

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convenience and propriety, instead of giving effect to one made.

There are many requirements of the Constitution that are more or less inconvenient, but, nevertheless, they had a purpose, and serve a useful end. The language of the Constitution is clear and unambiguous, that all acts which repeal former laws, shall recite in their caption or otherwise the *title* or substance of the law repealed. If it was not felt that this provision had something of inconvenience in it, a doubt as to its meaning would hardly have been raised. In fact, we suspect that if it had not been that the Legislature, in many cases, has failed to comply with, it, there would have been no thought of any need for construction to arrive at the meaning of the provision. The fact that it has not been complied with furnishes an urgent reason that the plain meaning should be enforced.

As to the demands of public policy, as affecting this question, we need but say, that the principle at issue involves the question practically as to whether the Legislature shall in all cases know the entire scope and effect of their legislation, or may blindly enact statutes, repealing, it may be, whole systems of regulation without knowing it, or having their attention called to the statutes thus repealed.

In a word, whether it is better to be assured of intelligent action, or at any rate the means of knowledge, in cases of repeal of existing laws, or

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that ~~such~~ repeals shall equally well be affected by unintelligent and unconscious acts, the results to be ascertained by the courts, and by them first known and defined, or shall all this be done by the Legislature itself? As between the two policies, we think there is no ground for hesitation. It certainly is the sounder policy that shall require of the legislative body, that it shall know and intelligently consider the results of its action, and that all it does shall be based upon an intelligent consideration of these results.

We only add, that if the view we combat is the correct exposition of the clause of the constitution, as to repealing laws, the same rule must be applied to the case of reviving a former statute, yet we doubt very much whether anyone, on this question, would maintain that a former statute would or could be revived by implication. If this be true, why not? Is it not simply because the requirement is, that in order to revive a former law you must recite in the caption the title or substance of the law revived? The language is the same as to repeals, as in case of reviving a former law, and the construction must be the same.

For these reasons, we think that the opinion of the Chief Justice, at the last term at this place, in the Hartsfield and McGee cases, 2 Lea, is the true exposition of the constitution, that implied repeals are forbidden by our constitution. By that opinion a most important law of the Legislature was declared void, and has been inoperative

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ever since. Believing as we do, that it was a fair and correct construction of the clauses of the constitution under consideration, and that this construction carries out and subserves the policy intended to be embodied in the supreme law of the land by the convention, we can but enforce it.

4L 671
14L 340
3pi 659
3pi 334

S. H. JARMAN, Ex'rs, v. R. F. JARMAN'S HEIRS.

1. DOWER. *Homestead. Dissent from will.* A widow is entitled to dower or homestead where her husband makes provision for her, by will, in either personal property or real estate, or both, and dies insolvent, without formal dissent in court, as provided for in section 2404 of the Code.
2. SAME. The law presumes the testator to be at the time of his death the owner of the property bequeathed to his wife, and will allow to the widow the right of the same presumption, and she is also entitled to the informal dissent given by operation of law.
3. SAME. The fact that a small portion of the bequest has not been absorbed in the payment of debts will not change the rule above laid down—nor that in addition to the bequest there was a devise of land, for an exhaustion of the personal property may necessitate a sale of the land to pay debts.

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4. **SAME.** The language—"a provision in personal estate"—does not preclude the idea of a provision in realty also.
5. **HOMESTEAD.** By law the homestead vests in the husband and wife jointly and 's a life estate. Upon the death of either it vests in the survivor. Neither has the right to dispose of it except with the consent of the other, and then only in the mode prescribed by law
6. **SAME.** The right of the wife is fixed during coverture, and is only lost by her voluntary alienation or abandonment, or by death.

FROM HARDEMAN.

Appeal from the Chancery Court at Bolivar.
H. J. LIVINGSTON, Ch.

WOOD & McNEAL for Complainants.

F. FENTRESS for the estate of Miller.

JESSE NORMENT for Widow.

TURNER, J., delivered the opinion of the Court.

R. F. Jarman, by his will, gave to his wife, R. S. Jarman, a large real and personal estate. The widow did not formally dissent. The estate of R. F. was indebted greatly beyond its value.

Two questions are presented: 1st, Is the widow entitled to dower? 2nd. Is she entitled to homestead? We answer both affirmatively. By section 2404 of the Code, it is provided: A widow may dissent from her husband's will—1. When a satisfactory provision in real or personal estate is not made for her, in which case she shall signify her dissent in open court within one year after

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the probate of the will. 2. When a provision in personal estate is made for her, but the whole of the husband's property, including the bequest, is taken for the payment of his debts, in which case, without any formal dissent, she may sue for dower. And in both cases she shall be endowed as if her husband had died intestate." These two divisions of the one section provides for a dissent, the one formal and by the act of the widow, the other informal and by operation of law. In the first case, it is presumed there will be nothing to interfere with the rights of the widow under the will, that the estate being unembarrassed by debt, she is at liberty to calculate for herself the advantages and disadvantages to herself by holding under the terms of the will, or by formally dissenting and taking that share of the husband's estate the law gives in case of his intestacy. By second division or ground of dissent it is intended to provide for the widow at all events, and not subject her to the chances of being pauperized by the insolvency (to her unknown) of the husband's estate.

The law presumes the testator to be at the time of his death the owner of the property bequeathed by his will, and will allow to the widow the rights of the same presumption. The fact that the husband has made apparently ample provision for her will of itself cause her to rest contentedly upon the faith of its certainty and security, and will not only repel but positively prohibit,

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the idea of the insolvency of the estate, and consequent loss to her. The bequest is to her an assurance by the husband of his ability as well as desire to give her the property, therefore she will make no inquiry or investigation. By the second division the failure of the bequest because of debts is in terms made a dissent by the wife so far as to enable her to sue for dower. It declares that in such case, without any *formal dissent*, she may sue, etc. * * In other words, she is not required to dissent in open court, but may signify her dissent by suit, and is not limited to twelve months, as by the first section. The concluding paragraph "And in both cases she shall be endowed as if her husband had died intestate," makes this construction the more manifestly right as the words "in both cases" have reference to the two acts of the wife signifying dissent.

The provisions are embraced in a single section of the Code, the causes for dissent specified by 1 and 2, and under the introduction, "A widow may dissent from her husband's will," followed by specifications of the two grounds.

The fact that a small portion of the bequest has not been exhausted in the payment of debts, will not change the rule, as creditors may at any time subject that remnant to debts. In the opinion of the writer even if after the payment of debts a portion of the bequest remained, but by comparison with the entire amount was inconsiderable, the widow's rights under the second division would

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not be embarrassed. Nor can the fact that in addition to the bequest, there was a devise of real estate, affect her right to dower, when an exhaustion of the personal estate necessitates a sale of the realty to pay debts. It would be a strained construction of the law to hold that a devise of realty which fails for the same reason as does the bequest of personalty, will defeat the widow of every right contemplated by the statute. The language "a provision in personal estate" does not preclude the idea of a provision in realty also:

I can see no good reason why both may not exist, and still the statute have full force. The obvious intention of the Legislature was that the indebtedness of the husband to utter insolvency should not cut off the wife from her rights of property under the general law simply because he had died testate instead of intestate. The purpose of the testator was to make a better provision for the wife by will than the law makes without it. Then, if in ignorance of his financial condition, and with an anxious purpose to secure her comfort and independence, he attempts that which fails, must the charities of the law also fail? We think not. To so hold would be to declare that having undertaken to give more than he could, in justice to his creditors, give, the faultless woman shall have nothing, that the mistake of the husband shall be visited upon the wife, that she must suffer for his ignorance of his wealth.

By our law the homestead vests in the husband

Allen v. Dent.

and wife jointly, and is a life estate; upon the death of either it vests in the survivor. Neither has the right to dispose of it except with the consent of the other by will or otherwise, and then only in the mode prescribed by statute. The right of the wife is fixed during coverture, and is only lost by her voluntary alienation or abandonment, or by her death.

The decree will be reversed as to the dower, and affirmed as to homestead, and the cause remanded for allotment.

4L 676
9L 9

C. S. ALLEN et al v. DENT & CORDES.

1. **LEASE. Forfeiture.** A lease, under which the rent is payable at intervals during the term, and which provides that if the lessee fail to pay the rent as stipulated, it is to be terminated and at an end, is not forfeited by such failure to pay, unless the lessor, by some affirmative act, insist upon the condition—such as a prompt re-entry with such purpose—after demand of the rent.
2. **SAME. Same. Waiver.** A recognition of the lessee's rights after he has failed to perform the condition, is a waiver of the forfeiture.

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3. *SAME. Construction.* The true construction of a lease which obligated the lessee to pay, during the term, the taxes that should accrue on the property, and which also provided that upon a failure to do so, he should forfeit his lease and also forfeit the right to remove the improvements placed upon the land, is that the taxes shall be paid in the ordinary course of collection without in anyway becoming a burden to the lessor. Whether paid before or after the expiration of the lease is immaterial.
4. *TRESPASS. Conversion.* A single act affecting chattels, which the owner of the chattels has the right to elect to treat either as a trespass or as a conversion of the chattels, is an entirety, and cannot be treated as a trespass as to one of the chattels and as a conversion as to the other.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

HUMES & POSTON, MYERS & SNEED and BIGELOW
& HILL for Complainants.

HARRIS & TURLEY for Defendants.

FREEMAN, J., delivered the opinion of the Court.

The questions for decision in this case grew out of the following state of facts:

A lease was made to respondent Cordes the 3d of April, 1867, by Mrs. Allen, the guardian of the present complainant, of certain vacant ground in the City of Memphis, at a rent agreed upon between the parties. The lessee bound himself to pay, during the term of said lease, "all the State, County and City taxes, and also all expenses,

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charges and costs which might accrue on said property." At the expiration of this term, which was for two years, it was renewed, with the modification that nothing was to be paid in the form of charges except the taxes, but with the other conditions unchanged. It was further provided that Cordes should have the privilege of improving the property as he might choose, and "might, at the expiration of said lease, remove any house or houses that he may have erected on said premises, provided he has complied with all the terms and conditions hereinbefore set forth." But should he "fail to pay the rent, as stipulated and agreed, for thirty days after maturity of each quarterly payment, and fail to pay the taxes as aforesaid, then this lease is to be terminated and at end, and all the improvements that may be made on said lots to be forfeited to the said Mary C. Allen, guardian, and she or any duly appointed agent, has the right of immediate entry upon said premises and improvements, with power to dispossess the said Cordes, or any of his tenants, all the improvements and buildings to remain on said lot, as the absolute property of the owners, free from all claims on the part of the lessee."

There is then added, that at the expiration of said lease, Cordes was to return the property and leave a good plank fence around it, with cedar posts; but this is not connected with the conditions imposing the forfeiture.

The term expired on the 3d of April, 1870, and

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the houses, not having been removed, the parties negotiated for some days, had several interviews, but failed to agree, as to their purchase. Between the 25th of that month and the 2nd of May the owners of the lots, present complainants, got possession, and when an attempt was made by an agent of the respondent, Cordes, to remove, they filed the original bill to enjoin him from so doing.

Cordes was allowed to become defendant, and answered the bill, and also filed a cross-bill, claiming that complainants had unlawfully taken possession of the property, and had received the rents and profits from the same, the houses being worth, as alleged, twenty dollars per month. It is also charged that some of the buildings had been burned, after possession taken by complainants, but that materials were left on the ground, of the value of two hundred dollars, which complainants had retained possession of. The theory of this cross bill is, that as to the houses remaining, Cordes is entitled to rents by reason of their unlawful occupation by complainants; as to the houses burned, the claim is, that he has received something over twenty-nine hundred dollars from Insurance Companies, by way of indemnity, he is entitled now to receive the difference between the amount so received and the real value of the buildings destroyed, with their rents before destruction, also the value of the *debris* left after their destruction. Complainant in his cross bill also claims a lien on the lots on which the property was

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situated, to secure whatever he may be entitled to recover.

We proceed to dispose of the questions presented in the record.

We had occasion, on a former appeal, to investigate the question of whether the forfeiture claimed by complainant could be sustained on the facts, or a similar state of facts. We see nothing in this record to change the result then reached; we then held that such a forfeiture could only be enforced on the failure to perform the condition, by an affirmative act, such as a prompt re-entry, with such purpose, after demand of the rent; a failure to do so during the term, and recognition of the lessee's right, after the failure to perform the condition, would always be treated as a waiver. In this we followed the rule stated by this Court in *Levett v. Bickford*, 8 Hum., 618-620, that such a right is strictly construed, and is not encouraged by the law.

There is no ground for a forfeiture shown in this case. The rent had been promptly paid. The taxes had been paid also, except, possibly, a small amount for the last year, all of which was paid within a few days after the termination of the lease, and within the usual period when such taxes are paid under our practice, and without any cost or annoyance to complainants.

The true construction of the contract is, that such taxes shall be paid in the ordinary course of collection, and shall not become, in any way, a burden on the lessor. This condition, in any

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view of the case, was fairly complied with. So, that the right to assert a forfeiture cannot be sustained in any view of the case.

As to the houses not burned, we think it clear that Cordes is entitled under the frame of his bill, treating the property as his own, and not going on the idea of a conversion, to be compensated for the reasonable value of the use of these houses, as houses situated on another's land, that is, the value of such use, less the value of the use of the land on which they stood, that being complainant's.

His right to removal having been only suspended by the action of complainants, he is now entitled to remove such as remain, and it will be so decreed: See *Cheatham v. Plinke*, 1 Tenn. Ch. 579, and authorities there cited.

As to the houses burned, Cordes is entitled to the like value of their use until burned, but not having chosen to treat the original occupation as a conversion, and going on the idea that the property was still his, he is not entitled to treat them as his for the purpose of charging rents or for their use, and also in receiving indemnity from the Insurance Companies, and at the same time hold the lessors liable for their value when burned, as property by them converted to their own use.

The property being his when burned, and so treated by him, he must be held to the rule, that he who owns must bear the loss from its destruction.

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The result might be different if the loss had been shown to have resulted from neglect or want of proper care; or any act of the lessors after taking possession, but nothing of this kind is pretended.

The party could not, perhaps, in any aspect of this case, recover for the property destroyed, and claim the other, not destroyed, as his own, as he has done. This would be to treat the same act, to-wit: the taking possession wrongfully, as simply a trespass, as to the property unburned and as a conversion of the houses subsequently burned. The act was single, and the consequences should be held to be entire, and either the one or the other, a trespass or a conversion.

Be this as it may, on the case made, we think we have laid down the correct rule.

We are equally clear there can be no lien on the land on which these houses were situated. It is a simple case of wrong done to the personal property of the owner, for the contract of the parties so made these houses. The fact that these houses happened to be placed on the land of complainants, cannot give any right to charge that land for injury done to them. That is all there is in this case on which to base the claim for such lien.

The result is, a decree will be drawn in accord with this opinion. The costs of this Court will be paid by the respondent, Cordes; of the Court below as ordered by the Chancellor. A

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reference may be had to the Clerk of this Court, as to the value of the use of the houses, or if preferred, the case can be remanded for the account.

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DAVID WHITBY et als. v. JOHN D. ARMOUR et als.

STATUTE OF LIMITATIONS. *Vendor and vendee.* The rule that the statute of limitations will not bar the vendor's lien for purchase money is confined in its application to the vendor and vendee, and will not affect the intervening rights of innocent third parties.

 FROM SHELBY.

Appeal from the Chancery Court at Memphis.
 R. J. MORGAN, Ch.

GEORGE GILLHAM for Complainants.

W. M. RANDOLPH for Defendants.

TURNER, J. delivered the opinion of the Court.

In 1843, John Whitby died, the owner of real

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estate in the city of Memphis. In 1854, the heirs filed a bill for its sale. A decree of sale for a part was obtained in February, 1858. A second decree of sale in the same proceedings was obtained in 1859, for what was then known as lot No. 6. The sale was had the 3rd of November, 1859. Armour became the purchaser, paying part in cash and executing his two notes for three hundred dollars each, due respectively in November, 1860, and November, 1861. In 1866, 1868 and 1869, he sold said lot in parcels to different purchasers.

The decree in Chancery retained a lien for the purchase money.

This bill was filed in November, 1875, to enforce the lien, and charges that the notes are lost. It further charges: "Complainants state, as will be seen by reference to the proceedings therein, in 1867, though there was nothing whatever to be done in said cause except to collect the unpaid purchase money for said lot No. 6, an order was entered upon the minutes of this Honorable Court requiring complainants therein to speed the said cause by the next term of this Court. At which next term, nothing having been done by complainants, some of whom were infants at the time, the cause was ordered to be dismissed."

While, by the rulings of this Court, no statute of limitations will obtain to bar the vendor's lien for the purchase money, this rule must be generally confined in its application to vendor and ven-

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dee, and will not affect the intervening rights of innocent third persons.

Here we have a lapse of fourteen years from the maturity of the last note to the first step taken for collection, and according to the allegations of the bill, three several private sales of the property and a dedication of parts of it for public streets in the city, during periods of from more than six to upwards of nine years, and all, except one sale of a small fraction, over seven years before the filing of this bill.

Other questions aside, the sub-purchasers, holding possession for seven years, have acquired a good title.

The facts made by the bill show that complainants have, by their *laches*, lost any lien they may have had upon the property.

As appears from these facts, the complainants were especially and peremptorily invited to "speed the cause," and were given to the subsequent term to do so. They say there was nothing to be done except collect this purchase money, and yet they to decline to further prosecute, and for such failure, the cause is dismissed, there not being so much as a suggestion that the purchase money, or any part of it, was unpaid.

In the decree of dismissal they acquiesced for eight years before bringing this suit.

If, after this decree of dismissal, one proposing to buy, undertake to investigate the title of the proposed vendor, shall find the final decree taking

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the cause out of Court, the natural and reasonable conclusion must be that everything necessary to the consummation of the sale to, and perfection of title in the vendee in Chancery has been done; that the finishing touch and main purpose of the proceeding—the collection of the purchase money—has been accomplished.

If, in this case, the collection has not been made, it is because of the *laches* of complainants, and through their *laches* in not only failing to collect, but in permitting the final order to be made, the purchaser may have been misled.

If we admit the purchase money has not been paid (and we think the facts stated do not authorize such admission), still the rule, that when one of two innocent persons must suffer, the loss must be borne by him whose conduct brought about the injury, applies with force in this case.

The decree is reversed, demurrer allowed and bill dismissed with costs.

Nelson v. Claybrooke.

JOHN NELSON et al v. JOHN S. CLAYBROOKE.

1. **ESTOPPEL.** The maker of a deed absolute in form, who testifies in a case to which he is no party, that he has no interest whatever in the land conveyed by the deed, is estopped from afterwards asserting that the deed was in fact a trust, and not an absolute conveyance.
2. **SAME.** His heir is also estopped.
3. **CHANCERY PRACTICE.** *Verdict of a jury. Immaterial issues.* The verdict of a jury upon immaterial issues may be set aside by the Court and a decree pronounced as if no trial by a jury had been had.
4. **SAME.** *Same. Same.* A defense—estoppel for example—which, if established, will be determinative of a cause is such a material issue that unless it be submitted, all other issues are *immaterial*; and if such pivotal defense be established, the verdict upon other issues submitted may be set aside, and a decree pronounced for the defendant.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

ESTES & ELLETT, GEO. GANTT, and H. E. JACKSON for Complainant.

T. B. TURLEY for Defendant.

TURNER, J., delivered the opinion of the Court.

By their original bill complainants seek to have a trust declared in their favor upon certain real estate in the City of Memphis, which was con-

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vayed in September, 1842, by Marcus B. Winchester, ancestor of complainants, to John S. Claybrooke, by deed absolute on its face.

The alleged ground for the relief sought is, that the purpose of making the conveyance was, to have Claybrooke apply the property or the proceeds of its sale, to the payment of the debts owing by Winchester, and that Claybrooke accepted it upon that trust; that the trust has been performed, with the property in suit left over, and that to it Claybrooke holds the legal title as trustee for complainants.

Claybrooke answers upon oath; denies the allegations, and sets up the purchase as absolute in form and fact; that he purchased the property for the consideration of \$28,000.00.

He also relies upon a deposition given by Winchester in 1851, in a case of Mayor and Aldermen of South Memphis v. Howard and Kent, as creating an estoppel on complainants, averring that that deposition shows that Winchester swore that the conveyance was made to Claybrooke without any reservation or trust.

An amended and supplemental bill was filed, charging that if the conveyance was not upon the trust alleged in the original bill, it was procured by means of undue influence exercised over Winchester by Claybrooke.

The answer denies the allegations.

On the trial of the cause, complainants demanded a jury and submitted the following issues:

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"1. Were or were not the conveyances made by M. B. Winchester to defendant for the purpose of having the property or its proceeds appropriated and applied by the defendant, to the payment of his (Winchester's) debts; and were the same accepted by the defendant for this object or on this trust?"

"2. Were or were not said conveyances made or intended as mortgages to protect and reimburse the defendant for all sums he might pay or assume for Winchester? or was the same an absolute sale of the property therein described from Winchester to defendant?"

"3. Were the conveyances obtained from Winchester by Claybrooke by undue influence, artifice or fraud, or did the defendant, by reason of confidential or professional relations with Winchester, secure for himself an undue bargain and advantage in obtaining said deeds?"

The jury responded: "We find the conveyance was made by M. B. Winchester to the defendant for the purpose of paying Winchester's debts, and was so accepted by defendant."

"We find said conveyance was an absolute conveyance."

"We find said conveyance was obtained from Winchester by Claybrooke on account of his embarrassed condition, and by reason of the confidential relations existing between them."

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The Court set aside the verdict and gave a decree for defendant, dismissing the bill.

It is argued by defendant, that in view of the defense of estoppel set up by the answer, the issues tendered and passed upon by the jury were immaterial, it being maintained that the question of estoppel was the primary and leading one, and must of necessity be determined before any others made by the pleadings can arise for investigation.

It is insisted by complainants that the question of estoppel does not arise, because Claybrooke was not a party to the suit of Mayor and Aldermen v. Howard and Kent, and had no legal interest either in the property involved in the litigation or in the decision of the Court; that the property involved in that suit was not embraced in the Winchester conveyance to Claybrooke. On the other hand, it is urged that Claybrooke did have an interest in the questions involved.

During the pendency of that suit, persons in interest were incompetent witnesses on the side of their interest.

With a view of testing his interest, the matters of fact just mentioned were inquired of from Winchester, and we think his answers show them affirmatively.

The parties introducing him were sufficiently impressed with the same belief to have Claybrooke execute to Winchester a release to any and all liability because of his warranty of title.

At all events the questions are made by the

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record with sufficient prominence and distinctness to have demanded action upon them, upon a proper issue submitted to the jury under a correct charge from the Court as to what would constitute an estoppel; until this was done other issues were immaterial.

But aside from this, and even admitting the issues to have been material, still we are of opinion the verdict of the jury is a nullity.

The findings that the conveyance was made and accepted for the purpose of paying Winchester's debts; that it was absolute, and that it was obtained on account of the embarrassed condition of Winchester, and by reason of the confidential relations existing between the parties, in no way reflects upon the integrity, motive, honesty or capacity of either of the contracting parties. Nothing is more natural than that an honest man will be willing to sell his property to pay his debts; that he should do so absolutely, and in doing so select as a vendee one between whom and himself confidential and friendly relations exist. There is nothing in the verdict out of which can be construed the finding of the presence of fraud, artifice or undue influence in the transaction of conveyance and acceptance between Winchester and Claybrooke.

The Chancellor did right to set the verdict aside.

The next inquiry is, was there an estoppel? To the objections taken here that the entire record in *Mayor and Aldermen v. Howard & Kent* is

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not presented, and, therefore, the question cannot be made upon the deposition, we say, it comes too late, having made no objection in the Chancery Court, but electing to pass upon it there you are committed, and will not be heard to complain of the absence of the other portions of that record. Besides, it is sufficiently pleaded to have entitled complainants to the use of the entire record if they had desired it.

In that deposition, Winchester, under the obligations of his oath, says, that he did, in 1842, convey the property to Claybrooke for a valuable consideration; that no reservations whatever were made except those expressed on the face of the deed; that the sale was absolute, and he is not aware of any reservation upon the face of the deed for his benefit; that the land in controversy is embraced in his deed to Claybrooke, who, with others, is interested in the suit.

He shows himself to be a very sensible and well-informed man. Is cautious and guarded in the use of language employed to convey his meaning. There is nothing in this very long deposition, written in the most part by Winchester himself, showing inadvertence, ignorance or mistake; on the contrary, it discovers care, thought and prudence, as well as a thorough knowledge of the facts deposed to. That Winchester understood what he was doing, and meant what he said, there can be no doubt, and those claiming under him are

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estopped to deny it. They must submit to the title remaining where he placed it.

Even though Winchester may have been mistaken in his belief that the deed of 1842 to Claybrooke embraced the land in controversy in the suit in which his deposition was given, still the question was the same, and he and Claybrooke were as much interested in its settlement, as if it had been made upon the deed of 1842. Being so intended, and both believing the property claimed by Claybrooke was involved, Winchester made his solemn disclaimer under oath in the beforementioned deposition, in a judicial proceeding: 2 Head, 604.

As said in *Hamilton v. Zimmerman*, 5 Sneed, 39: "No explanation is given of the admission, either in the bill or proof, and it is in vain to attempt to evade its force, by saying that the statement was an immaterial matter in the former suit, and therefore not likely to have challenged attention," etc.

Here the statements were the direct results of direct inquiry, and of matter believed by all, and especially by the witness, to be of importance in the cause and material to the issue.

Upon the questions of trust and of fraud and undue influence, it is sufficient to remark that much testimony has been introduced, consisting mainly of a letter correspondence between Winchester and Claybrooke. It is apparent, however, that but a small portion of the correspondence actually had been brought into the record, doubt-

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lessly because of its loss and destruction. From that we have, we find extracts tending to show a purpose to delay creditors, and some with a tendency to the creation of a trust for the payment of debts, but when we consider this correspondence connectedly, and as a whole, we think the decided weight of its meaning is a recognition by both of an absolute sale by Winchester to Claybrooke. In addition, Winchester, who lived for many years after it, never denied to Claybrooke that the sale was absolute and unconditional; instead he represents himself as Claybrooke's agent in the superintendency of the property.

The widow of Winchester, for several years after his death, recognized the title of Claybrooke, and after her death, his children, who had access to his papers and every opportunity to inform themselves as to the status of his title, delayed for several years before setting up any claim or bringing suit.

Upon the whole case, laying aside the question of estoppel, we are of opinion complainants have failed to make a case by that measure of evidence demanded by law.

Affirmed.

The account for rents, etc., will commence with the filing of the cross-bill. No account for antecedent rents, etc.

St. Louis Type Foundry Company v. Wisdom.

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ST. LOUIS TYPE FOUNDRY COMPANY v. D. M. WISDOM.

1. **PAYMENTS.** *How applied.* Where two successive firms of the same name, but composed in part of different members, have had a running account with a creditor, payments made after the formation of the last firm must, unless otherwise agreed by the parties, be applied in satisfaction of so much of the account as constitutes the debt of the firm whose funds are paid.
2. **PLEADING AND PRACTICE.** *Plea. Verdict.* The admission of one plea cannot be used to limit the effect of another, and a general verdict is always applied to the proper issue.

FROM MADISON.

Appeal in error from the Law Court of Madison. H. W. McCORRY, J.

P. L. STRICKLIN, C. G. BOND and R. W. HAYNES
for the Company.

E. L. BULLOCK for Wisdom.

COOPER, J., delivered the opinion of the Court.

Previous to the 3rd of August, 1870, W. W. Gates, Don Cameron and J. T. Hicks were partners in the publication of the West Tennessee Whig, and D. M. Wisdom and two other persons were partners in publishing the Jackson Tribune. About the date mentioned, Gates, Cameron, Hicks and Wisdom formed a new partnership, bought out

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Wisdom's partners, and commenced the publication of a new paper, called the Jackson Whig and Tribune. The style of the old firm as well as the new firm was W. W. Gates & Co. The old firm had a running account with the St. Louis Type Foundry Company, and the new firm continued to make purchases from the same company. From the 3rd of August, 1870, to the 15th of December, 1870, the purchases of the new firm from the Foundry Company amounted to \$1,248.65, and the payments on the account during the same time amounted to \$1,340. Gates was the book-keeper of both the old and the new firm, and made all the payments.

On the 15th of December, 1870, Gates closed the account of the Foundry Company by executing three notes in the name of W. W. Gates & Co. for \$658.76 each.

The present suit was brought on these notes against Gates, Hicks and Wisdom as partners under the name of W. W. Gates & Co. Gates and Hicks, being equally liable whether the notes were given for the debt of the old or new firm, have acquiesced in a judgment against them. Wisdom contested his liability under pleas of *nil debit* payment and *non est factum*.

The case was tried by the Judge without a jury, who found the issues and rendered a judgment in favor of Wisdom.

The Type Foundry Company appealed in error. As a fact, the account on the plaintiff's books

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being in the name of W. W. Gates & Co., for the old firm, was continued under the same name for the new firm, but there is nothing to show that this was done with the assent of the members of the new firm. There is evidence that the first large payment after the 3d of August, 1870, was raised and made for the purpose of giving the new firm credit with the plaintiff. The proof is clear that the plaintiff, at the time the notes sued on were given, knew that the account for the balance of which they were executed, had been contracted by separate firms, and Gates himself proves that neither he when he gave them, nor the agent or members of the company who received the notes, intended to bind the new firm for the debts of the old firm. The previous payments after the organization of the new firm were made by Gates without any direction as to their appropriation, and it does not appear that the plaintiff then or at any other time made a specific appropriation thereof. Three small and two large payments were made between the 3rd of August and 15th of December, 1870. The defendant claims that the two large payments which together exceed the purchases of the new firm were made with the assets of that firm. The Circuit Judge so found as a fact and there being evidence to sustain this view, the finding is, like the verdict of a jury, conclusive under the rule of this Court. The evidence has been examined, however, and leaves no doubt whatever as to the first of

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the large items, and very little as to the other. The money which made these payments was furnished by the new firm. The notes were not intended to be binding on the new firm, nor would they be in law, except to the extent of the consideration which enured to the benefit of that firm. If then the payments which together exceeded the account against the new firm be applied to the satisfaction of that account, there would be no consideration to sustain the notes nor the action based thereon.

The plaintiff must fail in his action unless he can show that the payments should be otherwise applied, and the argument on behalf of the plaintiff is, that the law will apply them to the oldest items on the whole account, although those items were contracted by the old firm. In other words, the contention is that, in the absence of any agreement of the parties, the law will apply the money of one person or firm to the payment of the debt of another person or firm. Such a rule would be manifestly inequitable, and can hardly be sound. The general rule in this State, in respect to the appropriation of payments is, that a debtor owing different debts to the same person has a right to apply the payment at the time when made to either debt, and if he fails to do so, and the payment be general, the creditor may apply it, and where no appropriation is made by either party the law will apply it according to the intrinsic justice and equity of the case. *Bussey v. Gant*, 10

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Hum., 238; *Fulton v. Davidson*, 3 Heis., 649; *Pointer v. Smith*, 7 Heis., 149. The rule thus enunciated will not aid the plaintiff. For as we have seen neither the debtor nor the creditor is shown to have made, at the time of payment, a specific appropriation of the payments, and it would clearly not be "according to the intrinsic justice and equity of the case" to apply the money of the new firm to the payment of the debts of the old firm. There is another difficulty in the plaintiff's way. The question presented is not one of the application of payments as between debtor and creditor, where each may in turn elect to make the application, and where, in the absence of an election, the law would apply them, but the payment of the funds of one party to a creditor, who has a debt against that party and also a debt against another of the same name. The creditor may elect to apply the payment to any debt of the debtor, or the law may apply it for him. But the creditor, in the absence of agreement, express or implied, cannot apply the money to the satisfaction of the debt of a third person. Nor, of course, would the law ever so apply it. If a payment may, by reason of the peculiar nature of the business, the assumption of a new partner or a long continued course of dealings, be applied to another debt than that of the payer, the application can only be sustained upon the ground of assent, express or implied. No such assent appears in this case. There can be

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no binding assent by conduct except with full knowledge of all the facts, and the whole doctrine of the appropriation of payments turns upon the intentions of the debtor, either express, implied or presumed: 1 Story's Eq. Jur., 459c. It seems, that at one time in the progress of the suit, the defendant thought that the account of the new firm with the plaintiff had not been fully paid, and he shaped one or two of his special pleas of *non est factum* to meet this view. It is suggested rather than argued that the defendant should be charged with the amount conceded by these sworn pleas to be still due. As a question of pleading, each plea at law is independent of every other, and the admission of one plea cannot be used to limit the effect of another. A plea of payment which concedes the validity of the instrument sued on, will not affect the defence under a plea of *non est factum* in the same cause. And a general verdict will be applied to the proper issue. As a question of estoppel, the pleading is open to proof in the particular case: *Hamilton v. Zimmerman*, 5 Sneed, 39. It is not denied that the account of the new firm, created after the execution of the notes in controversy, has been paid. There is no error in the judgment, and it must be affirmed.

 Nelson v. Trigg.

T. A. NELSON, Ex'r, Etc., v. MARTHA TRIGG, et al.

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1. **PRIVIES.** *How created.* The relation of privies may be created by operation of law, by descent or by voluntary or involuntary transfers from one person to another, and denotes mutual or successive relationship to the same rights of property.
2. **STATUTE OF LIMITATIONS.** *Color of title. Voidable deed.* A naked trespasser without color of title cannot transmit his right to a successor so as to enable the latter to couple the two possessions to form the bar of the statute of limitations, but those having color of title may transfer or convey their right by conveyance so as to enable the holder to connect successive conveyances and possessions with his own right and possession, and this, though one of the conveyances, was voidable.
3. **SAME.** *Creditors. Real estate of intestate. Lien. Purchaser from heirs of intestate.* Creditors of an intestate have no such lien on the real estate of the intestate as will prevent the bar of the statute of limitations in favor of the purchaser of the heirs of the intestate.

 FROM SHELBY

Appeal from the Chancery Court at Memphis.
J. O. PIERCE, Sp. Ch.

T. B. EDGINGTON for Purchasers.

H. C. KING for Creditors.

S. P. WALKER and GEORGE GANTT for Defendants.

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DEADERICK, C. J., delivered the opinion of the Court.

In 1863 John Trigg died, leaving a will, of which the complainant was appointed executor, and devising to his son, James B. Trigg, a tract of about 800 acres of land in Tipton County.

The will was proved and the executor qualified in 1865. On the 20th of May, 1864, said James B. and his brother, William W. Trigg, sold and executed bond for title to said tract of land, to the firm of Lutz, Windle & Co., composed of George R. Lutz, A. B. Windle and Jacob Steinkuhl, for the consideration of \$10,000. Seven thousand six hundred dollars was paid in cash, and two notes of \$1,200 were taken for balance, payable respectively in twelve and twenty-four months.

On the 14th of June, 1866, Lutz & Windle assigned and conveyed, by transfer of Trigg's title bond, to their partner, Steinkuhl, who had paid the balance of the purchase money, all their interest in said tract of land.

In September, 1867, Schaller & Gerke obtained judgment against said Steinkuhl in the United States Circuit Court at Memphis, on which execution was issued and levied upon said land, and the same was sold and bought by plaintiffs, and the same was conveyed by deed to the purchasers, by the U. S. Marshal.

On the 31st of January, 1871, Schaller & Gerke sold and conveyed by deed the said tract of land to Isaac W. Bass, and on the 28th of January,

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1873, Bass sold and conveyed the same by deed to York & Noblin, the present claimants, who took possession when they bought, and are still in possession of the land.

Lutz, Windle & Co., the purchasers of James B. and W. W. Trigg, took possession of the land at the time of the sale to them, in 1864, and each of the successive claimants took possession by themselves or tenants at the time of succeeding to the title as hereinbefore stated and have held continuously until the present, Noblin & York being now in possession.

The original bill in this case was filed the 20th of March, 1866, for the sale of land to pay debts of testator. It is alleged that testator left a large amount of real estate in and near Memphis and a plantation and lands on the Mississippi river, in Tipton County Tennessee. The complainant states that he is advised he has a right to sell so much thereof as may be necessary to pay debts.

The widow, heirs and creditors of testator were made defendants to this bill. In April, 1874, an amended bill suggesting insolvency of the estate of John Trigg, deceased, was filed.

And on the 9th of January, 1874, complainant Nelson, as executor, as aforesaid, filed an amended bill alleging he had recently before learned that York & Noblin claimed title to, and were in possession of the tracts of land in Tipton County, devised to James B. Trigg by his father, which he averred should be sold to pay testator's debts, and

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he prayed that they and Steinkuhl and Wooldridge be made defendants, and that the land be subjected to payment of testator's debts.

Steinkuhl, Noblin & York demurred to and answered the bill. Their demurrors were overruled.

In their answers Noblin & York rely upon the statute of limitations, and the continuous and adverse holding of themselves and those under whom they claim for more than seven years.

Steinkuhl, amongst other things, also relied upon the statute of limitations of seven years in an amendment to his answer, which was stricken out on motion and the cause was brought here by appeal, and at a former term of this Court it was held that the decree below in overruling the demurrers, to the bill of Nelson, was correct. But that it was error to strike out that part of the answer which relied upon the statute of limitations of seven years, and the cause was remanded.

Upon proof taken, the Chancellor held that the defense of seven years adverse possession under assurances of title had been made out and dismissed complainants bill which sought to subject said lands to sale for the payment of testator Trigg's debts, but without prejudice to any rights as between defendants.

From this decree the executor has appealed.

James B. Trigg had sold and given bond for title to his vendees, in 1864, before Nelson qualified as executor, and said vendees took possession

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immediately, and the successive holders by assignment of said bond and deeds have since held unbroken possession, one from the other, up to the time (and since) of the filing of amended bill, January 9, 1874. The complainants not questioning their title or seeking to divest it by making them parties for this purpose, thus making seven years such adverse holding up to the 1st of January, 1874, being eight days before the filing of said amended bill.

This is a good defense, unless :

1. The effect of the bill, filed by the executor, was to operate as a prohibition against the sale of the land, and we do not think it can have this effect, because no bill was pending when James B. Trigg sold and executed bond for title, and surrendered possession, and the defendants who claimed the land were not made parties to the executor's bill until January 9, 1874.

2. Or, unless there was not such privity between Steinkuhl and Schaller & Gurke, as enabled the latter to connect their possession and title with that of the former.

The relation of privies may be created by operation of law, by descent, or by voluntary or involuntary transfers from one person to another, and denotes mutual or successive relationship to the same rights of property: Freeman on Judgments, sec. 162.

By Act of 1819, sec. 1, (Code, sec. 2763) seven
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years adverse possession of granted land, held, by himself or those through whom he claims, by conveyance, devise, grant or other assurance of title, etc., vest in the holder the title in fee. Under this section it has been held that a sheriff's deed, founded on a void tax sale; a void deed; a decree for partition; an unregistered deed, or fraudulent or forged deed, are respectively "assurances of title" within the meaning of the act, 3 Yer. 405; 10 Hum., 214; 1 Yer., 256; 2 Swan., 656; 5 Sneed, 636; 11 Hum., 313. So also under the 2d section of the Act of 1819, (Code, sec. 2763). One in adverse possession, without "color of title" for seven years is protected to the extent of his possession by enclosure. But if the possessor holds under an assurance of title, as by title bond, or unregistered deed, he is protected to the extent of the boundaries named in his title papers: 10 Yer., 59; 3 Sneed, 329; 3 Head., 368, 1 Hum., 261.

A naked trespasser, without color of title, cannot transmit his right to a successor so as to enable the latter to couple the two possessions to make out the bar of seven years.

But those having color of title may transfer their possession and convey their right by conveyance so as to enable the holder to connect the successive conveyances and possessions with his own right and possession. And if the right may originate in a void or forged deed we see no reason why it may not be transmitted by consecutive possession and written assurances of title, although

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voidable in this case, as by the conveyance of the United States Marshal by deed, of the right of said Steinkuhl.

A court having jurisdiction rendered a judgment against Steinkuhl, and an execution was levied on this land while he held and claimed it, upon the transfer and assignment of Trigg's title bond, it was sold and possession given to the purchasers, and deed made to them for it by the Marshal, and some two years after their possession they sold and conveyed it to Bass, and Bass sold and conveyed to the present holders. The transfer of Steinkuhl's title was involuntary, and strictly speaking, he held only an equitable title, although he had paid the purchase money, and was entitled to a conveyance from James B. Trigg, of the legal title, but his possession was turned over to the purchasers, and the deed of the Marshal purported to convey Steinkuhl's title to them, and they thenceforth claimed possession and title in themselves, as derived from and through Steinkuhl, until they sold and conveyed the land. So that from the time James B. Trigg sold and gave bond for title in 1864 down to the time this suit began this land has been successively held by written assurances of title and by continuous and unbroken possessions which connect one with the other from 1864 to 1874.

From this it will be seen defendants Noblin and York and those under whom they claim have had more than seven years actual adverse possession

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under color of title, from January 1, 1867, to January 9, 1874, the date of the filing of complainant's bill against them.

The Chancellor dismissed the bill of complainants, original and amended, so far as it was sought to subject said land to sale for payment of the debts of John Trigg, deceased, but made no adjudication of any question in respect of the title of said lands as between defendants, the decree being pronounced without prejudice to such question. Steinkuhl filed his answer as a cross bill against his co-defendants, York and Noblin, claiming title against them. Even if an answer can be filed as a cross bill against a co-defendant under the statute, it is evident that Steinkuhl cannot establish such a title as will entitle him to any relief as against the complainant.

The Chancellor's decree dismissing complainant Nelson's bills, original and amended, so far as they seek to sell the land claimed and possessed by York and Noblin, or either of them, will be affirmed and modified as to the matters reserved as between defendants, and the cross bill of Steinkuhl will be dismissed. Complainant Nelson, as executor, will pay the costs of said amended bill in this Court and in the Court below, and Steinkuhl will pay the costs incident to his cross bill in this Court and in the Chancery Court.

Upon a petition to re-hear DEADERICK, C. J., said:

A petition to re-hear has been presented by

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complainant's solicitor insisting that creditors of Trigg's estate have a lien upon his real estate for their debts, and that a vendee of the son of intestate and those claiming title by color of title under them cannot rely upon the statute of limitation to defeat this lien. It was pleaded as a defense and the answer setting it up was, on motion stricken out and it was held at a former term that this was error. The Court said in delivering the opinion, that "so far as we can see this defense if made out would be effectual," and the decree was reversed and cause remanded.

Upon proof taken the Chancellor held the defense made out and decreed in favor of defendants.

From this decree complainants appealed, and at the present term we affirmed that decree, holding in effect that the defendants named did by the statute of limitations acquire at least such a possessor's right as against testator's creditors as to defeat their rights to subject it to sale for payment of debts. To this opinion we adhere, and dismiss the petition for a re-hearing of the cause.

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GATES, WOOD and McKNIGHT v. R. C. BRINKLEY.

1. **RESTITUTION.** If the defendant pay a judgment which is afterwards reversed, he may have an order on the plaintiff, or on his personal representative, if the plaintiff be dead, for the amount so paid to be restored to him.
2. **SAME. Evidence. Payment.** The fact of payment may be shown by parol evidence.
3. **SAME.** Money received by the plaintiff from a *party* defendant, as the price of the judgment under an agreement, in form a sale, is, in effect, a payment, and, as such, will be ordered to be restored, if the judgment be subsequently reversed.
4. **ADMISSIONS OF COUNSEL.** Admissions of counsel in argument, made under a misapprehension, may be retracted, but the real facts must be made to appear.

FROM SHELBY.

Appeal from the Chancery Court at Memphis.
R. J. MORGAN, Ch.

L. W. FINLAY for Complainants.

W. W. GOODWIN for Defendant.

McFARLAND, J., delivered the opinion of the Court.

This litigation begun several years ago by a bill filed by Gates, Wood and McKnight, to be relieved from the payment of several notes given by them to Brinkley for the rent or lease of cer-

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tain property in Memphis, upon the ground that they had been dispossessed of the property by the United States military forces during the late war.

The relief was refused and a decree rendered by the Chancellor against the complainants for the amount of the notes less certain credits. The complainants appealed, and in this Court the decree was modified as to the amount by giving relief as to one of the notes, but rendering a decree against complainants and their sureties on appeal bond, J. D. Williams and Samuel Mosby, for \$9,146.31 and one-half the costs of this Court.

Subsequently a writ of error was prosecuted to the Supreme Court of the United States, where the decree of this Court was reversed, and a mandate has been presented directing a decree to be entered awarding a perpetual injunction in accordance with the opinion of that Court.

It is now alleged that pending the writ of error in the Supreme Court of the United States, there being no supersedeas, the complainants and their sureties paid the decree of this Court in full, and motion is made to have the amount restored.

The defendant denies that the decree of this Court has been *paid*, but avers the facts to be, that after the decree was rendered, Mosby, one of the sureties, finding that his principals and co-security were in doubtful circumstances, under the advice of counsel for his own protection, instead of paying and satisfying the execution, purchased the judgment from Brinkley, paying him the

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amount thereof, and afterwards the execution was allowed to run in the name of Brinkley, but really for the use of Mosby, upon which \$2,405.31 was collected out of the property of the principals, and entered as a credit on the execution for the benefit of Mosby. This course was adopted in order to keep the judgment and execution alive so it could be used for the benefit of Mosby, the surety.

We do not think this alters the case or relieves Brinkley or his representative from the consequences of the reversal by the Supreme Court. Whatever may have been the form, the substance is, that he has collected or received this sum of money which the Supreme Court has decided he was not entitled to. The decree of the Supreme Court of the United States was long subsequent to the supposed transfer of the judgment to Mosby, but the decree of that Court was against the executor of Brinkley, against whom the cause was revived without objection or suggestion that the claim did not belong to him.

The amount paid should be restored with interest.

The complainants also move for a decree for the sum of two small credits, which they claim to have paid upon the notes, which were allowed by the Chancellor and by this Court.

It is urged, that as it has been decided that they were not liable for any part of the notes, they ought to recover the payments or set-offs set

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up against them. Whether they follow or not, it is sufficient to say that we find nothing in the opinion or mandate of the Supreme Court upon this subject, and we cannot go beyond it, and the motion, as to this matter, is refused.

The decree of restitution should be in favor of Mosby, McKnight and the assignee in bankruptcy of Gates and Wood, who was allowed to prosecute the writ of error in the Supreme Court jointly with McKnight. We leave them to settle between themselves their rights in the recovery.

Complainants also move for a decree for the costs of the Supreme Court, paid by them, but they have already a decree in that Court awarding execution for the amount.

They also move for the costs of this Court, paid in accordance with our decree, and the motion will be allowed.

Upon petition to re-hear, McFARLAND, J., said:

An earnest petition to re-hear has been presented.

1st, It is argued that in cases of this character, restitution will not be ordered except where specific property has been received, and remains so that it can be restored in *specie*, and consequently money paid cannot be restored, because the specific money paid has not been shown to be in the hands of the defendant.

Such a proposition we think cannot be maintained in reason, and some of the authorities re-

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ferred to in the brief show the power to order restitution is not confined to the cases supposed.

We have held that a party paying money under a judgment afterwards reversed, may have an order that it be restored, and we have no doubt that the holding is correct.

2nd. It is insisted that restitution can only be ordered where the parties are the same, and that the executor of Brinkley is a new party in such a sense as to require a new and original proceeding to recover the money from him. We have no hesitation in holding against this proposition. The cause was revived against the executor of Brinkley in the Supreme Court of the United States and he stands in the shoes of Brinkley, and subject to the same remedies and proceedings as would have been allowed against Brinkley had he lived; and no injury can result to him personally, as the decree to be rendered against him must be satisfied out of the assets of Brinkley's estate in his hands.

There can be no good reason why a new suit should be resorted to, because of Brinkley's death.

Again it is argued that before restitution can be ordered the *record* should show the payment of the money and evidence *aliunde* cannot be resorted to. Of course we would not order the money restored if the *fact* of its payment remained in dispute or doubt. We do not see, however, why there may not be other modes of ascertaining the fact as conclusive as the return of an execution

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satisfied. As, for instance, the admission of the parties by themselves or their counsel. We assumed that, in fact, the money was received by Brinkley from the admissions contained in the briefs of counsel in their answer to the motion. We accepted their statement of the facts to be entirely correct, and for that reason did not deem it necessary to require other evidence.

It is now assumed that the admissions were only made for the purposes of the argument. We certainly did not so understand it. In the brief then filed, signed by the same solicitors who present the petition to re-hear, after insisting that the decree of this Court was *not paid or satisfied*, the following language is used, to-wit: "The facts as they transpired are these: Upon the rendition of the parol decree of the State Supreme Court, S. Mosby and his attorneys, Harris, McKissick & Turley, finding that Gates, Wood and McKnight, and J. L. Williams were in failing circumstances, set about to secure him, Mosby, every means of protection against the loss of the entire judgment. Upon his, Mosby, becoming their surety, Gates and Wood had made deeds in trust on real estate to indemnify him. As a further security against loss, his attorneys advised him not to satisfy the judgment and execution, but to go to Brinkley and purchase from him the judgment and execution that he might have the benefit of any lien or priority the execution might give him on the goods or real estate of his principals or co-

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security. This—at the time very commendable advice was put into action by Mosby, and he purchased from Brinkley an assignment of the judgment and execution, himself took control of it, *voluntarily paid therefor the sum he might have otherwise been compelled to pay and set to work to collect the same from his principals and the one-half from his co-surety, Williams.*”

This is the statement of facts to support which an affidavit of J. B. Heiskell, exhibiting the letter of L. D. McKissick, one of the solicitors of Mosby, was presented, which says that Mosby *paid* the money to Brinkley upon an assignment as stated.

The returns on the execution were also referred to, showing that it was run for the benefit of Mosby. In view of these statements in answer to the affidavits of Mosby that he paid the money it cannot be said that the *fact that Brinkley received the money is in dispute*. The only dispute was whether the money was paid in satisfaction of the judgment or upon a purchase thereof.

If these statements were inadvertantly made under a misapprehension of the facts, of course they might be retracted and the real facts presented to the Court, but until counsel undertake to show that in reality the facts were different, and the admission inadvertently made, we will take the admission as true, especially when it is so supported as to leave no reasonable doubt of its truth.

The only question remaining, and the one al-

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ready considered on the former hearing, is, whether, upon the facts stated, the assignment to Mosbey made it his judgment so that upon the reversal, the loss fell upon him. And, upon this question, after a careful consideration of the argument presented, we entertain no doubt whatever.

It is unnecessary to enquire whether, upon an out and out assignment, to a stranger, of a judgment, which is afterwards reversed, showing that it had no valid existence as a debt whatever, the assignee could have any remedy for the money paid, and under what circumstances, and to what extent such remedy would be allowed.

In this case, as we have already said, whatever may have been the form, the substance of the transaction was, that the money was paid to Brinkley, because he had the power to collect it. The form of an assignment was resorted to to give Mosby the advantage of the judgment, and execution against his principals and co-surety.

If it had been expressly agreed that Mosby was to take the risk of a reversal, the case would be different, but, under the facts of this case, and in the absence of such a stipulation, we do not hesitate to say that Mosby is entitled to the benefit of the reversal. After the payment of the money, he joined his principals in the prosecution of the writ of error against Brinkley, which is inconsistent with the assumption that he was in reality the owner of the judgment.

Brinkley has received the money to which, by,

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the judgment of Supreme Court, he was not entitled, and his executor must restore it, otherwise the judgement of that tribunal would be utterly disregarded.

The judgment of the law cannot be avoided by specious refinement; the substance must be enforced.

Petition dismissed.

4L 718
8L 706
8L 712
10L 471
14L 156
14L 363

JOHN Y. KEITH v. E. A. CLARKE, Tax Collector.

1. **PRACTICE AND PLEADINGS.** *Special verdicts.* The practice of allowing juries to return a special verdict in the event they cannot agree on a general verdict, has frequently been followed in the courts of this State, and is not without precedent or authority.
2. **THE STATE.** *Now and forever. Perpetual succession and identity.* The entity of a State was not destroyed by the act of secession, or in any way subverted by the war. There is no such thing known to our system as the destructibility of a State. The legality of an act or contract is not, therefore, to be determined by its date or the period in the existence of the State when it was done, but in the quality of the act or contract.

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3. **BANK OF TENNESSEE.** *Notes issued during the war.* It is just as obligatory on the State to receive in payment of "taxes and other moneys due the State" the circulating notes of the Bank of Tennessee issued after May 6th, 1861, as those issued prior thereto, provided the same were not issued in support of the rebellion.
4. **SAME.** *Notes. Torbett issue.* The law presumes that the Bank of Tennessee put in circulation the "Torbett issue" in the ordinary course of its business for lawful purposes. The law will not presume the illegality of a transaction.
5. **SAME.** *Notes. In aid of rebellion. Burden of proof.* In this case it must be shown by the defendant that the notes tendered by the plaintiff to the defendant in payment of his taxes were issued by the Bank of Tennessee in aid of rebellion. It is not incumbent on defendant to show that the bills tendered him were issued in aid of the rebellion under contract or agreement, expressed or implied, with the State.
6. **BANK OF TENNESSEE.** *Private corporation.* The Bank of Tennessee and the State are different entities, and although the State owned all the stock and controlled the management of the bank, it was merely a private corporation.
7. **SAME.** *Constitutional law.* Corporations and individuals are not within the inhibition of that part of the Fourteenth Amendment of the Constitution of the United States prohibiting any State from assuming or promising to pay any debt or obligation incurred in aid of the rebellion.
8. **SAME.** *Notes. Receivable for taxes, when.* If, upon a new trial, it is found that the bills in question were not issued in aid of the rebellion, then the State is bound to accept them in payment of taxes, but if found to be issued in aid of the rebellion, the State cannot receive them under the Fourteenth Amendment.

FROM MADISON.

Appeal in error from the Common Law Court of Madison County. L. B. HERRIGAN, J.

JOHN H. SAVAGE, S. F. WILSON and JOHN W. BUFORD for Clarke.

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A. S. COLYAR and CAMPBELL & JACKSON for Keith.

JOSIAH PATTERSON, Sp. J., delivered the opinion of the Court.

Appeal from the Law side of the Common Law and Chancery Court of Madison County.

The Bank of Tennessee was chartered in the year 1838. The 12th section of its charter reads thus: "Be it enacted, that the bills or notes of the said corporation originally made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable at the treasury of this State and by all tax collectors and other public officers, in all payments for taxes or other moneys due the State."

It was settled in the case of *Furman v. Nichol*, 8 Wall., 44, that this provision in the charter was a contract within the meaning of the Constitution of the United States, between the State of Tennessee and every holder of the issues of the bank, and that it was obligatory on the State to receive the same in payment of taxes or other moneys due the State.

The State of Tennessee, on the 6th day of May, 1861, adopted what is known as the Act of Secession by which it attempted to dissolve its relations with the government of the United States. After the 6th day of May, 1861, the general government was in the attitude of waging war against

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the State to coerce it to remain in the Union, and the State was in the attitude of armed resistance.

In the case of *Furman v. Nichol* the Court held that the circulating notes of the bank issued prior to this attempted disruption and the inauguration of hostilities between the State and general government were within the terms of that decision, but the Court expressly withheld any opinion as to such notes as were put in circulation by the bank after that date.

The defendant, Clarke, as Tax Collector of Madison County, demanded of Plaintiff Keith the State tax assessed against him for 1874, and Keith tendered in payment two notes of the Bank of Tennessee, each of the denomination of twenty dollars, which were issued and put into circulation subsequent to the 6th of May, 1861. These notes constituted a part of what is known in the judicial history of the State as the "Torbett issue" of the Bank of Tennessee. Clarke refused to accept said notes in payment of the tax, and thereupon Keith protested and paid the same in lawful money of the United States. Keith then within thirty days thereafter instituted this suit before a justice of the peace under the Act of the General Assembly, approved March 21, 1873, entitled "an Act to facilitate the collection of revenues," to recover the money so paid. The case was appealed to the Law side of the Common Law and Chancery Court of said County, where the case was tried

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before a jury. The Court charged the jury in substance, that if the notes tendered by Keith, in payment of his taxes, were issued after the 6th day of May, 1861, and while the State was in hostility to the government of the United States, then they were illegal and void as against public policy, and not receivable in payment of taxes or other moneys due the State. A verdict for defendant resulted and the case was appealed to this Court, and without delivering an opinion this Court affirmed the judgment. A federal question being suggested, the case was then removed by writ of error to the Supreme Court of the United States, where the judgment of this Court was reversed and the cause remanded. This Court then remanded the case to the Law side of said Common Law and Chancery Court, where the case was again tried before a jury, and upon the special findings of the jury a judgment was rendered against the defendant. From this judgment the defendant has appealed to this Court. As the jury did not bring in a general verdict on the issues joined in the pleading, it is unnecessary to consider the correctness of the charge of the learned Judge, who presided at the trial, and neither is it material to consider, further than is herein noticed, the correctness of the many rulings made by him on the pleadings.

Among other things, the Court sustained a demurrer to a plea of the statute of limitation, and we think, correctly. This Court has repeatedly

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held that statutes of limitation do not apply to bank bills. It is so held at the present term of the Court in the case of *Marr v. The Bank of West Tennessee*.

The Court overruled a motion to dismiss for want of jurisdiction, and sustained a demurrer to a plea to the jurisdiction. To this, we think, no exception can be taken. This suit falls within the class of actions provided for in the Act approved March 21, 1873: *Tennessee v. Sneed*, 6 Otto, 69. If the notes were not issued in aid of the rebellion it is manifest that it was the duty of the defendant, as Tax Collector, to receive the bills tendered by plaintiff in payment of his taxes: *Furman v. Nichol*, 8 Wall., 44. Any law directing him to do otherwise impairs the obligation of the contract of the State as expressed in the 12th section of the Bank's charter, and is therefore unconstitutional. It has been insisted with much earnestness that the Court erred in directing, over the objection of the defendant, the jury to bring in a special verdict or finding of facts, in the event they could not agree upon a general verdict. We see no objection to this practice. It has been frequently followed in the courts of this State, and is not without precedent or authority: *Tidd's Practice*, p. 897.

The finding of facts by the jury, as recorded in the special verdict, is in substance: that the bills of the bank, tendered by plaintiff to defendant, in payment of his taxes, were regularly issued

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by the proper officers of the Bank and put in circulation; that defendant, as collector, refused to accept the same, and that plaintiff protested against such refusal, and thereupon paid his taxes in the lawful money of the United States; that he instituted this suit to recover the money so paid within thirty days thereafter; that there was no evidence as to what contract or consideration these identical bills were issued or paid by the bank; that the plaintiff purchased the bills in open market, without knowledge that the same were issued in aid of the rebellion, and that the Torbett issue of the bank was received and paid in the ordinary course of business by the bank and its branches.

As to whether any contract, arrangement or agreement was entered into between the Governor of the State and "Military Board," or either of them on the one part, and the Bank of Tennessee in its corporate capacity on the other that the "Torbett issue" of the bank should be issued and put in circulation in aid of the rebellion against the Government of the United States, and if so, whether it was actually issued and put out by the bank for that purpose, the jury failed to agree, and announced their disagreement in the special verdict.

In considering the correctness of the judgment rendered on this verdict, the Court must necessarily assume as a fact, without, however, deciding the question, that the "Torbett issue," of which the bills involved in this suit are a part, were

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under a contract or agreement between the State and the Bank, actually issued and put in circulation by the bank in aid of the rebellion. If this fact, taken in connection with the special findings of the jury, is immaterial, then the judgment should stand, otherwise, this Court will award a new trial.

It is settled by the Supreme Court of the United States in this case that the entity of the State of Tennessee was not, during the war, or at any other time, destroyed or in any way subverted. Whether peacefully occupying her place in the family of states, or in open rebellion against the government of the United States, her identity has been the same. Whatever difference of opinion may have formerly existed, it is now authoritatively settled by repeated adjudications of the Supreme Court of the United States, that the states constituting what is known as the Southern Confederacy, had no legal or constitutional right to withdraw from the Federal Union, and the result of the war proved that they were unable by force of arms to disrupt their relations with the general government. There is no such thing known to our system as the destructibility of a State. Justice Miller, in the opinion delivered by the Supreme Court of the United States, in this case, says: "The political society, which in 1796, became a State of the Union by the name of the State of Tennessee, is the same which is now represented as one of those states in the Congress of

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the United States. Not only is it the same body politic now, but it has always been the same. There has been perpetual succession and perpetual identity. There has, from that time, always been a State of Tennessee, and the same State of Tennessee. Its executive, its legislative, its judicial departments have continued without interruption, and in regular order. It has changed, modified and reconstructed its organic law, or State Constitution more than once. It has done this before the rebellion, during the rebellion and since the rebellion. And it was always done by the collective authority, and in the name of the same body of people constituting the political society known as the State of Tennessee."

The logical deduction from this premise is, that the legality of an act or contract of the State of Tennessee, is not to be determined by its date or the period in the existence of the State when it was made or done, but on the quality of the act or contract. It was unlawful for the State of Tennessee to engage in war against the Government of the United States, and whatever she did in carrying on or promoting the war, or in furtherance of her hostile aims and purposes, was and is, in a legal sense, void. On the other hand, all the legislation of the State, the judgments of its courts and the acts of its Executive, in short, every thing done by any of the departments of the State Government, not in violation of the Constitution of the United States, or in

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aid of the rebellion, is just as legal and just as much under constitutional protection during the war as at any other period during the history of the State.

It logically follows, and the Supreme Court of the United States so decides, that it is just as obligatory on the State to receive in payment of "taxes, or other moneys due the State," the circulating notes of the Bank of Tennessee issued after May 6th, 1861, as those issued prior thereto, provided the same were not issued in support of the rebellion.

It follows, then, that the whole question is resolved into one of fact to be determined by a jury according to the ordinary rules of evidence.

The law presumes that the Bank of Tennessee put into circulation the "Torbett issue" in the ordinary course of its business for lawful purposes. The law will not presume the illegality of a transaction, but the illegality must be made to appear by proof.

The direct question to be resolved by the jury in this case is, were the two bills tendered by the plaintiff to the defendant in payment of his taxes issued by the Bank of Tennessee in aid of the rebellion? This may be shown by proof that the identical bills were issued in aid of the rebellion, or that the class of notes to which they belong were issued and circulated in aid of the rebellion. In either case the burden of proof is on the defendant.

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It would not be sufficient to show that the issues of the bank in circulation on the 6th day of May 1861, were exhausted in the purchase of "Tennessee war bonds," and that thereby it became necessary for the bank to put in circulation the "Torbett issue" in order to properly carry on its business, for the necessity of doing an act altogether legal may grow out of an act done by the same person, which is altogether illegal.

On the other hand, we do not think it incumbent on the defendant to show by proof that the two bills tendered to him by the plaintiff were actually issued by the bank in aid of the rebellion under a contract or agreement, either expressed or implied, with the State. Had the bank issued its notes and put them in circulation in aid of the rebellion without the knowledge, consent or procurement of the State, such a transaction would be just as obnoxious to public policy as if they had been issued under an express contract with the State. Suppose they had been issued and delivered by the bank, either voluntarily or for a consideration, to the Confederate Government, to enable it more effectually to prosecute the war, would not such a transaction have been as flagrantly illegal as to have issued them to the State for the same purpose under an express contract?

We have already announced that because of the disagreement of the jury we are to assume for the purpose of this opinion that the "Torbett

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issue," of which the two bills in question constitute a part, was issued and put in circulation in aid of the rebellion. As the jury failed to agree upon the exact question upon which the case must be determined, a reversal will necessarily follow, unless there is something in the special findings which takes the case without the general rule.

The bank and the State are entirely different entities. While the State owned all the stock in the bank, appointed its officers, received the benefit of the profits it made, and dictated its management, yet it was merely a private corporation, and it is to be held and treated accordingly. This was expressly determined by this Court in the case of *Watson v. The Bank*.

In considering the legality or validity of any act or contract of the bank, we are to judge of it precisely as we would of a private individual. That public policy which repels from the courts parties who seek the enforcement of contracts prohibited by law or founded in immorality, is only intended for the guilty, and by no means embraces within its reason or operation innocent persons who are interested in such contracts.

The facts set out in the special verdict of the jury conclusively show that the plaintiff is an innocent holder, who purchased these notes in open market, without knowledge on his part that they were issued in aid of the rebellion, and that, too, after the "Torbett issue," of which they are a part, was placed in circulation and again received

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and paid out by the bank and its branches in due course of business. It necessarily follows that the bank could not resist the payment of these bills in the hands of the plaintiff, and that he can enforce their payment out of its assets. This is in harmony with the conclusions of this Court in the case of *Watson v. The Bank*, and the doctrine has been fully recognized by the Supreme Court of the United States: *Hanauer v. Doane*, 12 Wall., 832; *Hanauer v. Woodruff*, 15 Wall., 349.

Does the same rule apply to the State? It is declared in the Fourteenth Amendment to the Constitution of the United States: "That neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves, but all such debts, obligations and claims shall be held illegal and void."

It will be observed that corporations and individuals are not within the inhibitions of this clause of the Constitution.

In determining whether a corporation or private person is liable on a contract made in aid of the rebellion, we must look to the requirements of public policy, and be governed by the established rules of common law. In determining whether we will give effect to the contract of a State made in aid of the rebellion, we must look beyond the ordinary rules of law to the provision of the Con-

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stitution of the United States, declaring such contracts void. In this clause we find no exception. The inhibition is direct, positive, and without reservation as to innocent holders.

A bond of the State of Tennessee, made and executed in the usual way, if issued in aid of the rebellion, would be just as obnoxious to this clause of the Constitution in the hands of a holder however innocent, as a bond reciting the fact on its face that it was made and executed to enable the State to carry on war against the United States. Its language is most comprehensive and was intended to absolutely prohibit, in any event, the States from carrying out, or in any way paying any such debt or executing any such contract.

The 12th section of the Bank's charter, as already stated, is a contract of the State within the protection of the Constitution of the United States. It is in the nature of a continuing guaranty. It took effect the moment each circulating note was issued and delivered by the bank to the holder thereof. Each and every bill of the bank issued for lawful purposes, and in due course of business is embraced in this guaranty, and the obligation will rest upon the State to receive the same in payment of taxes or other moneys due it. Should it appear, however, on another trial, that the two bills of the bank tendered by plaintiff to defendant in payment of his taxes, were issued and put in circulation in aid of the rebellion, then the 12th section of Bank's charter, as to these bills, would

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not be within the protection of the Constitution of the United States, and the contract of the State to receive these particular bills in payment of its taxes or other moneys due it, would be to that extent void under the 14th amendment.

It results from the conclusions we have reached, that the judgment must be reversed and the cause remanded for a new trial.

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McFARLAND, J., delivered the following opinion :

The question whether the particular notes in controversy were issued and put in circulation in aid of the rebellion was material. If this fact had been found by the jury it would not have been met by the finding that the plaintiff bought the notes in open market without notice. If the notes were void upon grounds of public policy, because made and put in circulation in aid of the rebellion, then they would be void in whosoever hands they might come.

The jury failed to agree as to whether the "Torbett issue," of which the notes in controversy were a part, were made and issued for an illegal purpose. They do find that there was no proof directly in reference to these particular notes.

It is clear that the question was as to these particular notes, and a finding of illegality that did not include these particular notes would be

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bad. But I do not think it would be necessary to show the illegality by proof and a finding *pointing out these particular notes* specifically. A finding that the *whole issue* was void, supported by sufficient proof, would include these particular notes, and would not be met by finding that there was no proof specifically pointing out these notes. If there was no evidence upon which the jury could have found the whole Torbett issue void, then there would be no ground for reversal.

Whatever may be said upon the effect or sufficiency of the proof on this subject, I cannot say that there was no proof for the consideration of the jury. Whatever this or any other Court may have decided upon similar evidence, it was a question for the jury in this case, the party having the right to trial by jury.

State v. Miller.

THE STATE v. R. B. MILLER.

ATTORNEY-GENERAL. Fees. Where a bond of a county officer is reported insufficient, and a citation is issued by the Court to strengthen and increase the bond, and there is a judgment of ouster and costs against the officer, the Attorney-General representing the State is not entitled to a fee.

FROM SHELBY.

Attorney-General LEA for the State.

T. W. BROWN for the District Attorney-General.

The bond of R. B. Miller, Public Guardian, was reported by the Grand Jury as insufficient. Citation was ordered by the Hon. L. B. Horrigan, J., presiding, and issued to the said Miller to strengthen and increase the amount of his bond or show cause why his office should not be declared vacant. Miller failed to give the required bond. Judgment of ouster and for cost was rendered against Miller.

The State was represented by the Attorney-General, who moved to tax a fee of five dollars in the case.

The motion was disallowed by the Court, from which the Attorney-General appealed to this Court.

Opinion by the Court: The judgment of the the Criminal Court in this case is affirmed.

State v. Frost.

THE STATE v. J. E. FROST.

ATTORNEY-GENERAL. Fees. The Attorney-General is not entitled to a fee where a Constable's bond is reported insufficient, and who, upon citation, gave a good and sufficient bond, and citation dismissed at the cost of the county.

FROM SHELBY.

Attorney-General LEA for the State.

T. W. BROWN for the District Attorney-General.

The Grand Jury of Shelby County reported the bond of J. E. Frost, a Constable of said county, as being insufficient. Citation was issued to strengthen and increase his bond or show cause why his office should not be declared vacant.

He appeared before the Court, gave a satisfactory bond and the proceedings were dismissed at the cost of the county.

The Attorney-General moved to tax a fee of two dollars and fifty cents in his favor. The motion was disallowed by L. B. Horrigan, J., presiding, and the Attorney-General appealed to this Court.

Opinion by the Court: The judgment of the Court below is affirmed.

State v. Foster.

THE STATE v. JOHN FOSTER.

ATTORNEY-GENERAL. *Fees.* The Attorney-General is entitled to no fee where a forfeiture is taken against a witness and afterwards set aside at the cost of the county.

FROM SHELBY.

Attorney-General LEA for the State.

T. W. BROWN for the District Attorney-General.

Forfeiture was taken in the Criminal Court of Shelby County, L. B. Horrigan, J., presiding, against witness Foster, and attachment issued. Afterwards the forfeiture was set aside and the attachment dismissed at the cost of the county.

The Attorney-General moved the Court to tax a fee in his favor of two dollars and fifty cents, which the Court refused to do, and thereupon the Attorney-General appealed.

Opinion by the Court: The judgment in this case is affirmed.

State v. Lowenstine.

THE STATE v. SAM. LOWENSTINE.

ATTORNEY-GENERAL. Fees. The Attorney-General is entitled to no fee in case of forfeiture and attachment for witness, where the witness is adjudged to pay the fine and costs.

FROM SHELBY.

Attorney-General LEA for the State.

T. W. BROWN for the District Attorney-General.

Forfeiture was taken in the Criminal Court of Shelby County, L. B. Horrigan, J., presiding, against witness Lowenstine, and attachment issued. Witness was adjudged to pay fine and costs.

The Attorney-General moved the Court to tax a fee in his favor in that case of five dollars. The motion was disallowed by the Court, and the Attorney-General appealed.

Opinion by the Court: Affirmed.

STATE v. SIBLEY et al.

1. COSTS. *State Tax.* Where a defendant has worked out a fine and costs in the County workhouse, in default of cash payment thereof and State tax is included therein, the County is liable to pay the State tax received, to the State.
2. SAME. *Forfeiture.* Where a forfeiture upon a bail bond is set aside upon payment of costs, State tax is not to be included, as such proceedings are only incidental to the original suit.
3. SAME. *State and County Tax. Fine for non attendance of a Juror.* For same reason State and County tax should not be charged where a fine was imposed for the non-attendance as a juror.
4. SAME. *Same. In case of contempt.* In case of contempt the defendant should not be adjudged to pay State and County tax.
5. SAME. *Same. Forfeiture against witness.* Where forfeiture is taken against a witness, which is afterward set aside upon payment of costs, it is error to include State and County tax in the bill of costs.
6. SAME. *Same.* Where an execution for costs is returned *nulla bona* and a judgment against the State for the same has been paid, the defendant cannot be made to work out such costs, the remedy is by execution.
7. SAME. *County liable to State. When.* The County is liable to repay the State out of money received from the wages of the convict.

FROM SHELBY.

Appeal in error from the Criminal Court of Shelby County. L. B. HERRIGAN, J.

State v. Sibley.

Attorney-General LEA for the State.

CARROLL & TAYLOR for Defendants.

FREEMAN, J., delivered the opinion of the Court.

The above cases involve the correctness of adjudications of costs against the County of Shelby, and several individuals.

We proceed to dispose of them in their order.

Sibley's case presents the question, whether the County of Shelby is bound for the State tax on litigation, and what amount on the following facts:

Defendant was convicted on indictment for an assault and battery, sentenced to fine and payment of costs, and in event of failure to pay, to hard work in the County work-house, until fine and costs are paid in money or labor, as the law directs in such cases. The County of Shelby has, by contract, leased out the service of convicts, at the rate of ten cents per day. The convict, however, receives a credit on his indebtedness at the rate of twenty-five cents per day. The State tax on litigation of five dollars was regularly taxed in this case. The defendant has worked out the amount against him, according to law.

The Circuit Judge adjudged the County bound to pay the amount individually received by the County under the lease, to wit: the sum of \$200.

The State and County both appeal.

If the costs were collected in money, unquestionably the State would receive it. The State, where it is not done, substitutes labor in the work-

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house, crediting the party himself at twenty-five cents per day for this labor, but under a contract of lease, the legality of which does not seem to be contested by the Attorney-General, receives in fact, but ten cents per day. This sum, however, is money received in discharge of the costs, of which the State tax is part. We think the State is entitled to have it paid over into the State Treasury, otherwise it becomes a source of County revenue, which was not intended.

The case of *State v. Hallihan* was this: He had been held to bail, to answer an indictment against him. Failing to appear a forfeiture was taken on the bond, on which *scire facias* issued. Defendant afterwards entered his appearance in Court, and for good cause shown, the forfeiture was set aside on payment of costs, which costs were adjudged against him and sureties.

The Court adjudged payment of State and County tax on litigation due, from which there is an appeal.

The Statutes on this subject are substantially as follows: Code, sec. 557, required the payment by the unsuccessful party in every litigation in our courts, and the party taxed with costs in cases of indictment or presentment, to pay a specific tax on litigation. By the Act of 1870, Code, T. & S. Ed., sub-secs. 10 to 23 inclusive, this tax is fixed and specified as follows:

19. On each original suit in any court of law or equity in this State, five dollars.

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20. On each petition for division and distribution of estates, five dollars. The same on each appeal, writ of error from the Circuit or Chancery Court to the Supreme Court. On appeals or *certiorari* to the Circuit Court, and lastly on each presentment or indictment, three dollars and fifty cents. By the Act of 1873 the tax on indictments and presentments was increased to five dollars.

The Legislature has chosen to specify the particular kinds of litigations on which the tax shall be paid. The enumeration of these particulars, serves to guide us as to what was meant by sub-section 19, fixing the tax on each original suit in any of the courts of law and equity, in the State. It is suits between parties litigant in civil suits to enforce matters of personal contention between them. The other cases mentioned otherwise would be included under this section, for they are all original suits, but of a peculiar character except the *certiorari* in the stead of an appeal. We therefore conclude the case of a forfeiture on bail bond, on incidental proceeding to enforce the appearance of a party to answer to the indictment or presentment, is not included, nor subject to State and County tax, otherwise there would be two taxations for the same litigation, that is on the original proceeding, and then on the incidental one. We do not think such a construction should be given the provisions cited, unless it should be plainly expressed, as it is not.

Judgment reversed.

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State v. Dennison: Defendant was fined by the Court for non attendance as a juror, and adjudged to pay the costs. The Court adjudged him liable to pay the State and County tax.

Under the above view, we do not think him so liable, and the judgment is reversed.

W. O'Berst was the case of a fine imposed for contempt of court, when the Judge below taxed the defendant with the State and County tax.

We think this was error, and the same is reversed.

State v. Jim Shields, was a forfeiture taken against him and sureties for failing to appear as a witness in a criminal case, we suppose, a *sci. fa.* was issued and the forfeiture set aside on appearance, the party adjudged to pay the costs.

The Court adjudged a State and County tax in this case, which was error, and the same is reversed.

State v. Rufus Williams, is a motion to require the County to turn over to the State the wages of the convict, he having been convicted of petty larceny, and sentenced by the jury to imprisonment in the Penitentiary, but for satisfactory reasons the Court commuted the punishment to labor in the work-house for six months, the costs being adjudged against him. An execution was issued on the judgment and returned *nulla bona*. A judgment over against the State has been rendered for the costs on this return, and they have been paid.

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The Court held, in such a case, the convict could not be made to work out the costs in the work-house, and the only remedy was by execution.

The Court adjudged, however, the County liable to repay the State out of money received from the wages of the convict, at the rate at which the convict was paid for by the lessees. We take this to be the meaning of the judgment, and assuming this, we think it correctly ruled by his Honor, and affirm his judgment.

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2. *Same. Same.* The better practice is to endorse the request on the evidence of the debt, with the time agreed upon, so that the time may readily be counted out of the period of limitation.

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2. *Award to be made the decree of Chancery Court.* Where the submission agreed to be made a rule of the Chancery Court, provided that any differences between the arbitrators should be referred to a specified umpire, whose decisions "shall be final and conclusive, and the award made, and the decree based thereon, shall be in accordance with said decisions," and it was referred to the umpire to determine whether the complainant was interested, and, if so, to what extent in certain lands, his award that the complainant was entitled to an interest of one-half in the lands, and that the defendant is indebted to him, in a sum designated, for one-half the net proceeds of the sale of the land, with interest from the date of sale, is good, the submission expressly providing that the decree, in accordance with the award, shall be a complete, conclusive and final end and

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4. *Award. Partial and incomplete.* An award cannot be partial and incomplete, unless it be shown that a well-founded matter of litigation, within the purview of the submission, was omitted.
5. *Arbitrators. Umpire. Signing the award.* Where the submission contemplates an award by the arbitrators of the matters on which they agree, and a separate award of the umpire upon all matters on which the arbitrators differ, it is not necessary that the arbitrators and umpire shall sign one award.
6. *Award. Objections thereto.* Objections to an award that it is not a complete settlement and determination of all the matters submitted, and that it is not in conformity with the submission, are too general.
7. *Formal award.* Although the language used in a submission to arbitration may admit of the construction that after the umpire has decided matters of difference, the arbitrators are to make a formal award embodying his decisions, the failure to do so would not affect the award, the submission expressly providing that the umpire's decision shall be final.

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See ATTACHMENT, 1.

1. *Rights of assignee and judgment creditor claiming under levy of execution.* As between the assignee under a general assignment for equal benefit of all the creditors, and judgment creditors of the assignor, claiming under an execution levy it is a race of diligence, and the judgment creditor will not be deprived of the fruits of his diligence merely on the ground that the levies were made "just before or while the assignment was being written."

2. *Registration notice to debtor.* The registration of a trust assignment does not perfect the title of the assignee to the assignor's choses in action as against creditors, but there must be notice to the debtors before garnishment.

Miller v. O'Bannon, 398.

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1. *Service.* An attorney is entitled to a reasonable compensation for his services, if faithfully and intelligently discharged, without regard to the benefit such services may be to his client.
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1. *Fees.* The Attorney-General is entitled to no fee in case of forfeiture and attachment for witness, where the witness is adjudged to pay the fine and costs. *State v. Lowenstine*, 737.
2. *Fees.* The Attorney-General is not entitled to a fee where a Constable's bond is reported insufficient, and who, upon citation, gave a good and sufficient bond, and citation dismissed at the cost of the county. *State v. Frost*, 735.
3. *Fees.* Where a bond of a county officer is reported insufficient, and a citation is issued by the Court to strengthen and increase the bond, and there is a judgment of ouster and costs against the officer, the Attorney-General representing the State is not entitled to a fee. *State v. Miller*, 734.
4. *Fees. Unlawful carrying arms.* Upon conviction for unlawfully carrying a pistol, the Attorney-General is not entitled to a fee of twenty dollars, but only to the fee allowed by law for convictions in misdemeanors. *State v. Kennedy*, 228.
5. *Fees.* The Attorney-General is entitled to no fee where a forfeiture is taken against a witness and afterwards set aside at the cost of the county. *State v. Foster*, 736.

AWARD.

See **ARBITRATION.**

BANK OF TENNESSEE.

1. *Notes issued during the war.* It is just as obligatory on the State to receive in payment of "taxes and other moneys due the State" the circulating notes of the Bank of Tennessee issued after May 4th, 1861, as those issued prior thereto, provided the same were not issued in support of the rebellion.
2. *Notes. Torbett issue.* The law presumes that the Bank of Tennessee put in circulation the "Torbett issue" in the ordinary course of its business for lawful purposes. The law will not presume the illegality of a transaction.
3. *Notes. In aid of rebellion. Burden of proof.* In this case it must be shown by the defendant that the notes tendered by the plaintiff to the defendant in payment of his taxes were issued by the Bank of Tennessee in aid of rebellion. It is not incumbent on defendant to show that the bills tendered him were issued in aid of the rebellion under contract or agreement, expressed or implied, with the State.
4. *Private corporation.* The Bank of Tennessee and the State are different entities, and although the State owned all the stock and controlled the management of the bank, it was merely a private corporation.
5. *Constitutional law.* Corporations and individuals are not within the inhibition of that part of the Fourteenth Amendment of the Constitution of the United States prohibiting any State from assuming or promising to pay any debt or obligation incurred in aid of the rebellion.
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BANKS.

1. *Liabilities of subscribers for stock.* By the general banking Act of 1859-60, the original subscriber is liable for the amount of his subscription until the same is paid up, whether he retains or assigns the stock, and this applies to subscribers

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for stock in a bank chartered before the passage of the Act, although the charter contained no such provision.

2. *General Banking Act Constitutional.* The Act is not unconstitutional, because impairing the obligation of a contract. It does not assume to take away the power to assign stock, but simply to regulate its transfer; imposes no new obligations or restrictions, but prescribes the conditions upon which the original stockholders might assign their stock.
3. *Stock. Liability of assignor and assignee.* The assigners of such unpaid stock are first liable, and if the amount cannot be collected, then their assignors, who were original subscribers, are liable.
4. *Liability of stockholders. Discharge in bankruptcy.* The liability of a stockholder is a fixed, definite sum, and is provable before a bankrupt court, and a discharge in bankruptcy will release such stockholder from liability.
5. *Stockholders. Payment in depreciated bills.* Where a bill is filed to settle the respective liabilities of stockholders in an insolvent bank, and a stockholder has paid his stock in depreciated bills of the bank, he should only be credited with the value of said bills at the time of payment.
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Marr v. Bank of West Tennessee, 578.

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Assignee, rights of. Ordinarily, upon the facts being made known to the Courts before final decree, and it not appearing that there are conflicting rights, it may be that an assignee in bankruptcy will be allowed to take the place of the bankrupt; but if he postpones the application until after the final determination, it becomes a matter of favor and not of right.

Jones v. McKenna, 642.

BILLS AND NOTES.

1. *Consideration. Mortgage. Rents.* Bartlett, Gould & Blakemore had a mortgage on land devised to W. W. Trigg, he being in possession; the time for payment having passed; W. W. Trigg sold and conveyed the land to Williams, with the assent of Bartlett, Gould & Blakemore, they releasing their mortgage, and receiving the notes given by the purchaser, secured by another deed of trust, having twenty-one months to run. The land was subject to the debts of the ancestor of W. W. Trigg, who had devised it to him. It was afterwards subjected to sale for their payment. The purchaser remained in possession up to the appropriation to the ancestor's debts, the rents amounting to as much or more than the notes given for the purchase. *Held*, on bill filed to enjoin the collection of the notes in the hands of Bartlett, Gould & Blakemore and their assignees, that the consideration paid by them was ample, in the loss of the rents, which they might have appropriated to their debt; that there was no failure of consideration on their part, and a recovery could be had on the notes. *Williams v. Bartlett*, 620.

2. A note executed in Tennessee, by a citizen of that State, to a citizen of Alabama, bearing on its face interest at the rate of eight per cent. per annum, the legal rate in Alabama, is manifestly an Alabama contract, and is valid.

Brown v. Gardner, 145.

BOND.

See CHANCERY PLEADINGS AND PRACTICE, 6; GUARDIAN AND WARD.

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See PLEADING AND PRACTICE, 9.

CERTIFICATE.

Defective probate. Amendment. The correction of the certificate of privy examination of a married woman, under the Code, sec 2082, may be made by the officer who took the examination, after he goes out of office, and the oath to the truth of the correction need only be made in open court without being entered on the minutes. *Grotenkemper v. Carver*, 375.

CERTIORARI AND SUPERSEDEAS.

See EXECUTION, 4.

● CESTUI QUE TRUST.

See TRUSTEE, 2; DAMNUM ABSQUE INJURIA.

CHANCERY JURISDICTION.

1. *Cloud on remainder.* A bill will lie to remove a cloud from a remainder in land.
2. *Invalid sale, condition of avoidance.* Upon the avoidance of a sale of lands where the purchaser has been guiltless of fraud or imposition, the holders of the lands under the sale, whether the original vendees or their successors in interest by descent or purchase, with or without warranty, are entitled to have the lands charged in their favor with a proper restitution of the purchase money paid upon the sale that is avoided.
3. *Same. Same. Amount of restitution.* The amount of this restitution will be that of the purchase money paid upon this sale, with interest, but not exceeding (if the lands have been subsequently sold) the amount of the purchase money paid at the last sale (with or without warranty), with interest.

Aiken v. Suttle, 108.

4. *No jurisdiction to compel municipal corporations to exercise legislative discretion. Damages.* The Court of Chancery has no power to compel a municipal corporation to exercise a power left to its legislative discretion, and, therefore, a bill to coerce the construction of a sewer in a particular direction cannot be entertained; nor has the Court the jurisdiction of a claim for damages, by reason of a defective sewer, except as an incident to some recognized ground of equity.

Horton v. Mayor and City Council of Nashville, 39.

5. *Will. Devisavit vel non.* The Chancery Court has no jurisdiction to try an issue of *devisavit vel non*: the jurisdiction of the Circuit Court is exclusive.

Harrison v. Gulon, 531.

CHANCERY PLEADINGS AND PRACTICE.

1. *Sale of real estate. Dower.* Upon a bill filed to sell a house and lot, and, by consent, one-third of the purchase money goes to the widow in lieu of dower, it is error, on motion, to allow the purchaser to have an account to ascertain the amount of indebtedness of the widow to the purchaser, which is sought to be set off against the sum allowed in lieu of dower.

Rainey v. Biggart, 501.

2. *Lien for solicitors' fees.* An agreement between the complainant and solicitors in the cause, in whose favor a decree had

 CHANCERY PLEADINGS AND PRACTICE—*Continued.*

been rendered, declaring a lien for specified fees on the property of the defendant, will not bind the defendant, and a subsequent decree thereon for a sale of the property for the satisfaction of claims of some of those solicitors would be erroneous as to the defendant. He has a right to stand upon the original decree, to be executed as an entirety. *Stillman v. Stillman*, 271.

3. *Exceptions to a Clerk's report.* Exceptions to a Clerk's report of sale are inadmissible, which require the Court to go behind or modify the decree under which the sale was made, or to look outside of the record on which it is based. *Myers v. James*, 270.
4. *Bill of Revivor.* A bill to revive a suit against a devisee is not a supplemental bill to revive, but an original bill in the nature of a bill of revivor, and when filed against a non-resident, without attachment of property, must be supported by proof: Code, secs. 4371-72. *Anderson v. McNeal*, 303.
5. *Bill to remove cloud. Payment of taxes. Receiver.* In case of a bill filed to remove cloud from title, the defendant in possession failed to pay taxes. The complainant paid until a receiver was appointed on petition of complainant. Complainant's bill was ultimately dismissed on hearing. *Held*: He was entitled to be reimbursed the taxes paid by him pending the litigation out of rents in the hands of the receiver, on the principle that it was the duty of the Court to so have applied the funds, and it would have done so, had not complainant paid them. He having done so, entitles him to receive the money back on decree against him in this Court. *Wicks v. Sears*, 298.
6. *Trustees. Additional bond. Sureties.* Under a bill by a beneficiary to have a trust assignee removed for fraudulent conduct, the Chancery Court has power to require the trustee to give additional bond, and to administer the trust under the direction of the Court.
7. *Same. Interest. Counsel fees. Costs.* The trustee in default will be charged with interest without proof of receiving it, and will not be allowed cost and counsel fees. *Faust v. Levy*, 320.
8. *Verdict of a jury. Immaterial issues.* The verdict of a jury upon immaterial issues may be set aside by the Court and a decree pronounced as if no trial by a jury had been had.

 CHANCERY PLEADINGS AND PRACTICE—*Continued.*

9. *Same. Same.* A defense, estoppel for example, which, if established, will be determinative of a cause is such a material issue that unless it be submitted, all other issues are *immaterial*; and if such pivotal defense be established, the verdict upon other issues submitted may be set aside, and a decree pronounced for the defendant. *Nelson v. Claybrooke*, 687.
10. *Demurrer, bad in part is bad altogether.* This Court will not depart from the general rule that a demurrer, bad in part is bad altogether, where a decision of the matter of demurrer might give one party an unconscientious advantage, and the case presented by the bill is proper for equitable examination, although the complainant has been negligent in making defense at law *Phoenix Ins. Co. v. Day*, 247.
11. *Bill to enforce vendor's lien. Collateral security. Parol evidence inadmissible, when.* Upon a bill filed to enforce vendor's lien, parol evidence is inadmissible to sustain the defense by answer that the vendor had received certain notes in payment of the installments of purchase money then due, the defendant's endorsements on the notes showing that they were assigned as collateral security.
12. *Attorney's fees. Reference.* Where a deed of conveyance, after describing the purchase notes sufficiently to identify them, retained a lien on the land for the "due payment of said notes," the lien will cover the reasonable fees of attorneys provided for on the face of the note for their collection, although this feature of the notes be not mentioned in the deed. Evidence as to the amount of fees having been introduced by the complainant in advance of the hearing on the merits, a reference at the hearing to the Clerk to take proof and report upon them could not prejudice the defendant, and would not be error of which he could complain.
13. *Whether land sold under vendor's bill should be divided not an issue on the merits.* Whether land sought to be sold under a vendor's bill can be divided or should be sold in a body is not a matter in issue on the merits, and may be ascertained by reference after a hearing on the merits.
14. *Instant reference may be ordered.* Under our practice the law presumes that the parties litigant are present in Court during the term, and the Court may order a reference to be executed instantan, with or without notice to the party or his solicitor, and error cannot be assigned upon the discretionary action of

CHANCERY PLEADINGS AND PRACTICE—Continued.

the Chancellor in this regard, without showing facts which establish an improper exercise of the discretion to the injury of the parties.

15. *Cross-bill filed after trial term will not stay hearing of original cause.* Where an application to file a cross-bill is not made until the trial term, the Court, while granting the application, may refuse to stay the trial of the original cause, and should do so where the matters set up constitute no defense to the relief which may be granted. *Clark v. Carlton*, 452.

16. *Judicial sales. Inadequacy of price.* Mere inadequacy of price is no ground for setting aside a judicial sale.

17. *Same. Clerk. Has discretion as to time of sale.* A Clerk has a discretion in selecting a day for the execution of a decree of sale, which will not be controlled except in a clear case of abuse.

18. *Same. That creditor claims prior title is no ground for interference.* It is no ground for interference with a judicial sale that the creditor, in whose favor the sale is ordered, insists upon a prior title to the property, under which he claims, duly recorded and mentioned in the pleadings of the cause. *Myers v. James*, 370.

19. *Cross-bill after decree in Supreme Court. Endorser's payment.* The payment by accommodation endorser of a judgment at law against them in depreciated bank notes furnished by their principal, will be a satisfaction of a subsequent decree in equity against the principal for the same debt, and, where the suit in equity was pending in the Supreme Court at the time of the payment, the defense may be made by cross-bill filed before or after the final decree of the Supreme Court.

Kirtland v. Miss. & Tenn. R. R. Co., 414.

20. *Tenants in common. Bill for partition. Account for profits.* As an incident to a bill for partition, an account of profits will be ordered where one tenant has occupied and used the entire land, and is shown to have made a profit over and above the mere use, and beyond his share.

21. *Same. Rents. Improvements.* If such tenant be charged with an occupation rent, and has cared for the property as his own, the rent should be calculated upon an average for the whole term of occupancy, and he should be allowed such usual repairs as a prudent landlord would make on his own property. or would allow to the tenant as a deduction on the rent, and

CHANCERY PLEADINGS AND PRACTICE—Continued.

for the value of permanent improvements as an offset to the occupation rent, unless the land can be, or has been, so allotted as to include the improvements in the share of the occupying tenant.
Tyner v. Fenner, 469.

22. *Endorser. Demand and notice.* That where an endorser wishes to defend in equity against his liability, for want of due notice, he must make such defense in his pleading, especially where the case has been conducted to a hearing, on the assumption of recognition of his liability being fixed on his part. He cannot for the first time raise this question under a reference, ordering a report as to the amount due to the holders of the notes.
23. *Same. Same.* Where notes endorsed have been enjoined from being collected by bill on the part of the maker and endorser, before due, the holder is excused from demand and notice to such endorser. It would be idle to demand what he has been forbidden to receive by such injunction. *Williams v. Bartlett*, 620.
24. *As to necessary parties. Quere*, whether a mother who buys land, and causes the deed to be made to her in trust for the separate use of herself and children for life, and after her death to go to her children or the issue of such as may be dead, with the power of sale and re-investment reserved to her, sufficiently represents the children to make a sale of the land good against them under a bill filed for the enforcement of the lien reserved on the face of the deed for the payment of the purchase money?
25. *Remaindermen. Equitable subrogation.* If such a sale be declared void as to the remaindermen, because not made parties, the Court intending to sell and the purchaser to buy the entire estate, so much of the purchase money as was applied to the payment of the lien debts, with interest, as provided in the original contract, will be, as against the remaindermen, although infants, by way of equitable subrogation, charged in favor of the purchaser as a lien on the land, and the land subjected to the satisfaction thereof by sale.
26. *Revivor.* A suit may be revived under the Code, sec. 2855, by the infant heirs and successors of a deceased complainant, upon motion in their name by next friend.
27. *Decree. How set aside or impeached.* A decree by consent on behalf of infants cannot be set aside at a subsequent term upon motion or petition by them, nor can it be brought up by appeal. It can only be impeached by an original bill.

Jones v. McKenna, 630

CHANCERY PLEADINGS AND PRACTICE—*Continued.*

28. *Parties.* To a bill for the purpose of avoiding the sale of the lands, and of reclaiming them, in a case where there can be no account of rents and profits, only the holders of the lands at the time, under the sale, are necessary parties. The original or intermediate vendees, with warranties of title, are proper, but not necessary parties.

29. *Statement. Application.* In 1846, 92 acres of certain lands, belonging jointly to complainant, then the wife of C. K. G., and her two brothers, were sold to J. B., and in 1847, 147 acres to R. C. S., complainant's interest being conveyed in each instance under a power of attorney, executed by her husband and herself, with her privy examination. In 1857, J. B. conveyed his 92 acres to R. C. S. During that year complainant obtained a divorce *a vinculo* from C. K. G., for his fault, after which she married J. A. A., whose widow she now is. After the death of R. C. S., 100 acres of the 147 purchased by him in 1847 were sold (as included in a larger tract) under a decree in settlement of his estate, and purchased by L. D. S. The bill was filed in 1875 against the widow and the real representatives of R. C. S., and the widow and the personal and real representatives of L. D. S., to have said powers of attorney, and said conveyances thereunder, etc., annulled, as clouds upon complainant's title in remainder to an undivided one-third of the two tracts of 92 acres and 147 acres, and to have her rights in remainder declared. One-third of the purchase money paid by J. B. and by R. C. S., in 1846 and 1847, less C. K. G.'s life estate in this one-third, must be taken to have been paid on account of complainant's remainder in this portion of the lands. At the sale of the 92 acres by J. B. to R. C. S., in 1857, one-third of the purchase money, less the vendor's interest therein for the life of C. K. G., must be taken to have been paid on account of complainant's remainder in this tract. And at the sale of the 100 acres to L. D. S. (as included in the larger tract), one-third of the purchase money applicable to the 100 acres, less the life interest therein as of that date, must be taken to have been paid on account of complainant's remainder in these 100 acres. The restitution to be charged in favor of the defendants as a lien upon complainant's interest in said lands, is what was paid on account of the remainder in 1846 and 1847, with interest, but the portion of this amount applicable to the 92 acres, and to the 100 acres of the 147, subsequently sold, not to exceed what was paid at the subsequent sales on account of the parts of the remainder involved therein, with interest from the dates of these sales respectively. And all of these sales being made

CHANCERY PLEADINGS AND PRACTICE—Continued.

without reference to any separate valuation of the life estate and the remainder, the former is to be determined, in every instance, upon the basis of the actual subsequent length of life of O. K. G.

30. *Improvements. Allowable when.* Improvements are allowable against the owner of lands, in favor of holders in good faith under color of title, from which the lands are reclaimed, only as an offset against rents and profits. Where, as in the present case, there can be no claim for rents and profits, there can be no allowance on account of improvements. *Aiken v. Settle*, 103.
31. *Decree upon demurrer.* A decree upon a demurrer, if upon the merits, is as conclusive as though the facts set forth in the bill were admitted by the parties, or established by evidence, and is conclusive of everything necessarily determined thereby. But if the Court merely decides that the complainant has not stated facts sufficient to constitute a cause of action, or that the bill is liable to specific objection, such decision does not extend to any issue not before the Court on the hearing of the demurrer.
32. *Same.* Where, therefore, a bill to foreclose a mortgage of husband and wife on the wife's realty, making the mortgage an exhibit, was demurred to on the ground that the certificate of acknowledgement to the mortgage exhibited did not state that the Clerk was personally acquainted with the bargainors, or that the wife was privately examined, and the demurrer sustained as to the wife, after which the omissions in the certificate was corrected by the Clerk, and an amended and supplemental bill filed, by leave of the Court, upon the mortgage with the corrected certificate, setting out the proceedings under the previous bill, it was held that a demurrer to the latter bill was properly overruled. *Grotenkemper v. Carver*, 375.
33. *Partnership. Statute of limitation.* The statute of three years presents no barrier in a Court of Chancery to an account between deceased partners.
34. *Same. Lapse of time.* There is no period of time definitely fixed as an absolute bar. The reasons for refusing relief, because of lapse of time, are, in part, that the loss of papers, death of parties and witnesses, and the fallure of memory, involve the transactions in so much obscurity and uncertainty that any attempted settlement will probably fall far short of reaching the truth, and may do injustice. *Bolton v. Dickens*, 569.

CLERK.

See **CHANCERY PLEADINGS AND PRACTICE**, 17.

CLERK'S FEES.

On land condemned for taxes. Where several lots of land belonging to the same person are assessed for taxes, together as one body, giving, however, separate numbers, and, in some instances, the size of each lot, but including them in one tract and in one valuation, and the same are condemned in the Circuit Court, the Clerk is only entitled to a fee of \$1.00 for each tract or parcel so reported and sold, and not for each lot comprising the tract or parcel. *State, ex rel. Coleman, v. Gaines*, 806.

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COLLATERAL SECURITY.

See CHANCERY PLEADINGS AND PRACTICE, 11.

COLOR OF TITLE.

See STATUTE OF LIMITATIONS, 1.

COMPENSATION.

For services. Statute of limitation. Where a party renders service in hope of a legacy in sole reliance in testator's generosity, without any contract, express or implied, no action will lie if no provision be made by will. But where, from all the circumstances, it is manifest that it was mutually understood that compensation should be made by will, and none is made, an action lies to recover the value of such services—but the statute of limitation being pleaded, services can only be recovered for six years prior to death of testator. *Taylor v. Wood*, 504.

 CONSTITUTIONAL LAW.

See **BANKS, 2**; **BANK OF TENNESSEE, 5**.

1. *Salaries of public officers.* The Act of the Legislature of 1879, entitled "An Act to regulate and equalize the salaries of certain public officers," is unconstitutional, because repugnant to that provision of the Constitution which provides, "No bill shall become a law which embraces more than one subject, that subject to be expressed in the title."

2. *Act of Legislature. More than one subject. Title.* If an Act contains more than one subject, and only one subject is expressed in the title the whole Act is a nullity.

State, ex rel., Knight, v. McCann, 1.

3. *Privilege tax. Steamboat and railroad agents.* The Act of the Legislature of 1879, chap. 84, providing means for the local government of the "Taxing District," which provides in sec. 7, sub-sec. 36, that "Steamboat agents and the agents of railroad companies, other than the proper officers of railroads terminating at the Taxing District, shall pay a privilege tax of \$25 per annum," is not a regulation of commerce between the States, and is not, therefore, in violation of the Constitution of the United States.

Lightburne v. Taxing District, 219.

4. *Repeal by implication.* The Act of 1875, chap. 109, provided for the payment to the State of a prescribed tax by foreign insurance companies for the privilege of doing business in this State, "which shall be in lieu of all other taxes" By the Act of 1879, chap. 84, sec. 7, sub-sec. 53, an additional tax for the benefit of the Taxing District was laid on the same business. Held, that the latter act was valid.

5. *Same.* The provision of the Constitution of 1870, art. 2, sec. 17, that "All acts which repeal, revive or amend former laws shall recite in their caption or otherwise the substance of the law repealed, revived or amended," does not apply to acts which, by their positive provisions, operate a repeal of previous acts by necessary implication.

Home Ins. Co. v. Taxing District, 644.

6. *Salaries of Judges.* The Act of 1879 fixing the salaries of Judges of the Supreme, Chancery and Circuit Courts is valid and constitutional.

7. *Acts of Legislature. Journals.* The weight of authority is that notwithstanding an Act has the signature of the Speakers of the Senate and House and is approved by the Governor and is published by proper authority, the Courts, nevertheless, may

 CONSTITUTIONAL LAW—*Continued.*

look to the journals of the two houses, to see if the same was constitutionally passed. Whether this rule prevails to its full extent in this State in view of the *new* constitutional provision requiring bills to be signed *in open session* and *noted* on the journals, is reserved.

8. *Same. Same.* The said Act of 1879 regularly passed the Senate and in the House was amended in the second section by striking out "Thompson & Steger's Code" and inserting "Revised Code of Tennessee" passed the House, but amendment never concurred in by Senate; *held in substance* there was no amendment, "Thompson & Steger's Code" and the "Revised Code of Tennessee" being the same book.
9. *Judges Salaries.* The constitutional provision that the salaries of judicial officers shall not be diminished or increased during the time for which they were elected does not apply to their term of office, and where a Judge is appointed to fill out the unexpired term of a deceased Judge, he is entitled to compensation fixed by law at the time he assumes the duties of the office. *Gaines v. Horrigan*, 608.
10. *Exemption as juror.* Special exemption from service as jurors and road hands, enacted in a charter of incorporation, in favor of officers and employees of the company, is class legislation, and unconstitutional. *Neely v. State*, 316.

CONTRACTOR AND SUB-CONTRACTOR.

See CONTRACT, 8.

CONTRACT.

See BILLS AND NOTES, 2.

1. *Sale of land. Defective title. Recission.* Where a contract in writing for the sale of land is executed by a deed of conveyance, in which, by oversight, a material part of the land is not embraced, and the vendor has no legal title to that part, but only, at most, an equitable right to obtain it, the vendee is entitled to a recission unless the title is perfected before decree. The land lying in another State, the recission will be upon condition that the complainant make a deed of reconveyance within a reasonable time, duly probated for registration according to the laws of that State. *Winfrey v. Drake*, 293.

CONTRACT—Continued.

2. A contract for the sale of land upon credit is not usurious, because the price agreed on is a sum equal to one for which the land had been offered to the purchaser, cash, plus ten per cent. per annum thereon for the time credit is given.

Brown v. Gardner, 145.

3. *Contractor and sub-contractor.* Under a contract between a contractor for the grading a railroad, and a sub-contractor of part of the same work, which stipulated for the retaining, by the contractor, of a certain per centage of the monthly estimates as collateral security for the execution of the contract; and provided, in the event the sub-contractor failed to keep a sufficient force at work to complete it in time, that the contractors might put a force at work at his expense, or declare a forfeiture, and re-let, or do the work and hold the sub-contractor liable for any damage or injury by reason of his failure. The sub-contractor left the work, and the contractor declared a forfeiture, but neither re-let nor did any further work, and, by agreement with the railroad company, abandoned the work, after receiving full pay for what had been done. It was held that the per centage retained belonged to the sub-contractor, and was recoverable accordingly.

Winters v. Fleets, 546.

4. A contract for the sale of a plantation, with the personal property thereon, lying in Tennessee, the grantor domiciled in Athens, Alabama, the grantee in Nashville, Tennessee, each of these places being at the time within the lines of the military forces of the United States, is not invalid, either by reason of the non-intercourse acts of Congress or the rules governing the intercourse of belligerents during the late civil war, as expounded by the Supreme Court of the United States in *Montgomery v. the United States*, 15 Wall., and *the United States v. Lapene*, 17 Wall. Nor is a deed made in pursuance of such a contract void, although when it was executed, Nashville remaining within the military lines of the United States, Athens, Alabama, and that portion of Tennessee in which the plantation is situated, had been reoccupied by the Confederate forces, both grantor and grantee actually residing within their lines.

Brown v. Gardner, 145.

5. *The State. Now and forever. Perpetual succession and identity.* The entity of a State was not destroyed by the act of secession, or in any way subverted by the war. There is no such thing known to our system as the destructibility of a State. The legality of an act or contract is not, therefore, to be determined

CONTRACT—Continued.

by its date or the period in the existence of the State when it was done, but in the quality of the act or contract.

Keith v. Clarke, 718.

6. *Sewing machines. Rents. Sale.* A contract to "rent" a machine at a fixed monthly rental, on payment of a certain number of which the renter becomes owner, is not a renting but a sale, and is valid.

Singer Manuf. Co. v. Cole, 439.

CORPORATION, MUNICIPAL.

See CHANCERY COURT.

Power to employ counsel. A municipal corporation has no such interest in a suit exclusively directed against its officers as will authorize it to retain counsel for its defense, although the bill may enjoin the officers from performing the functions of their office, and ask for the appointment of a receiver with power to control the corporate property and finances.

B. McP. Smith v. Mayor and City Council of Nashville, 69.

CORPORATION.

See BANK OF TENNESSEE, 4.

1. *Franchises. User.* Very slight circumstances are sufficient to show user of franchises under a charter of incorporation, and a consequent organization of the corporation.

Augusta Manuf. Co. v. Vertrees, 75.

2. *Directors.* Directors of a corporation are required to show reasonable capacity for the position, scrupulous good faith, and the exercise of their best judgment.

3. *Same. Not personally liable, when.* Directors who act in good faith, and with reasonable care and diligence, but nevertheless fall into a mistake, either of law or fact, are not personally liable for the consequences of such mistake.

4. *Same. Same.* The by-laws of a corporation provided that the Board of Directors should elect a Secretary, whose term of office should be twelve months, or until his successor was elected, and who was to give bond with security for the faithful discharge of his duties. The Board elected the Secretary, and took the prescribed bond; and re-elected the same person Secretary for each of the two following years, but took no new

CORPORATION—Continued.

bond, supposing, after consideration and discussion of the question, but without taking legal advice, that the bond taken was a continuing security during those years. The Secretary became a defaulter in the third year. *Held*: That the Directors, who were good and efficient business men, stockholders of the corporation, and acting in good faith, were not liable to make good the loss. *Vance v. Phoenix Ins. Co.*, 385.

COSTS.

See EXEMPTION; CRIMINAL LAW, 29, 30.

COUNTY COURT.

1. *Warrants. May bear interest, when.* The County Court, as the representative of the county, may, in consideration of forbearance to sue, contract with a creditor of the county for the payment of interest on a county warrant after its registration by the Trustee, until there is money in the treasury to meet it in regular order, but no longer. *Davidson County v. O'Neill*, 28.
2. *Jurisdiction. Probate Court, Shelby County.* This Court has only such jurisdiction (T. & S. Code, sec. 316*h*) as to guardian settlements, as was previously conferred upon the County Court.
3. *Same.* After a final settlement and resignation of a guardian the County Court could not entertain a bill filed in accordance with the forms and practice of a Chancery Court, to surcharge and falsify the settlement. For this purpose resort should be had to a Court of Chancery. County Courts have power to bring guardians to a settlement, but for this purpose the remedy is summary, and not by a bill according to the forms of Chancery. *Roy v. Giles*, 535.

CRIMINAL LAW.

1. *Indictment.* An indictment which charges that the defendant was an employé of the penitentiary, and, as such, "did aid, assist and suffer" a prisoner confined in the penitentiary under conviction for a felony to escape, charges only one offense, and is good under the Code, sec. 5340.
2. *Confession.* Upon the trial of the defendant for suffering a convict to escape from the penitentiary, a confession of the defendant, induced by improper means, may be used to the extent of showing that it was thereby discovered that his wife had in

CRIMINAL LAW—Continued.

her possession a draft and deed, dated shortly before the escape, the draft drawn by a brother of the convict, and made payable to the defendant or his wife; and the deed being a conveyance of land executed by the convict's wife to the defendant's wife.

3. *Same.* The Attorney-General may, by an interrogatory to a witness, show that the State is willing to give the defendant the benefit of his explanation of the instruments thus discovered, and legitimately refer to the fact in reply to the argument of the defendant's counsel that the defendant's mouth was sealed by law. *Clemons v. State*, 23.
4. *Former acquittal.* An acquittal of the charge of stealing a hog is not a bar to a subsequent indictment for wantonly and willfully killing the hog. *State v. Ellison*, 229.
5. *Unlawful weapons. Self-defense.* The courts cannot, merely upon the ground that the defendant was acting in self-defense, sanction the use of an unlawful weapon in an unlawful manner, nor will this Court reverse the action of the trial Judge in inflicting punishment left by law to his discretion, except in a case of gross abuse of that discretion. *Coffee v. State*, 245.
6. *Indictment. Letting a house for the purpose of prostitution.* An indictment which charges that the defendant let a dwelling house, well knowing that the lessees intended to use it for the purpose of prostitution, and it was so used, is fatally defective. *State v. Wheatley*, 280.
7. *Plea of former conviction.* A plea of former conviction for the unlawful disturbance of a religious assembly "by loud noise, profane discourses, and indecent behavior," is no defense to an indictment for an assault with intent to commit murder in the second degree by shooting at a person named with a loaded pistol, although the loud noise of the previous indictment may have been the report of the pistol in the shooting of, the last indictment. *State v. Ross*, 442.
8. *Jury. Officer. Record.* The failure of the minutes of the Circuit Court to show that the jury returned into court in charge of their officer is not reversible error.
9. *Same. Challenge.* A person peremptorily challenged on a former trial is incompetent to be placed on a succeeding panel of jurors.

CRIMINAL LAW—*Continued.*

10. *Same. Judges of the law.* It is not error to charge the jury that they cannot arbitrarily disregard the law as charged by the Court.
11. *Opinion of the Supreme Court.* The opinion of the Supreme Court on a former hearing on the facts of the case is not evidence on a subsequent trial.
12. *Reasonable doubt.* A verdict of guilt negatives presumption of innocence, and the Supreme Court will not reverse on facts unless the evidence preponderates against the verdict.
Robertson v. State, 425.
13. *Witnesses under the rule.* In a criminal case involving the life of the prisoner, a witness, whose testimony has been discovered a few moments before he is put on the stand, ought not to be excluded merely upon the ground that the defendant had joined the State in requiring that the witnesses be put under the rule, where the testimony of the witness is material to the defense.
Smith v. State, 428.
14. *Indictment of executors, guardians, etc. Act of March 9, 1875.* An indictment of an executor, administrator, guardian or trustee, under the Act of March 9, 1875, for converting money to his own use and failing to pay over trust funds, must contain averments that a settlement, voluntary or compulsory, has been made, that the money has not been paid over, that judgment has been obtained, and *q. fa.* thereon returned *nulla bona.*
State v. Anderson, 226.
15. *Discharge of the jury.* A jury in a criminal cause may be discharged by the Court without the consent of the accused, where they have had a sufficient length of time to deliberately, carefully and fully consider the entire case as presented by its facts and as governed by the rules of law given in charge by the Court, and there is no possibility of an agreement upon and return of a verdict, but the Court should be satisfied of the impossibility of an agreement, and the reasons for such conclusion by the Court should be set out in its order of discharge, so that a revising Court may consider them upon a plea of "once in jeopardy."
State v. Pool, 368.
16. *Death of Judge pending motion for new trial.* Where, after the trial and conviction of the defendant in a criminal case, and the entry of motion in arrest of judgment and for a new trial, the Judge died suddenly within a few days, and the business of the Court was brought to a close for the term by an epi-

CRIMINAL LAW—Continued.

demio, the motion may be heard and determined at the next term, a statement of the evidence in the form of a bill of exceptions, agreed upon as correct by the State's Attorney and the defendant's counsel, may be looked to by the Court below, and upon appeal by this Court, in acting upon the motion.

Sims and Foster v. State, 357.

17. *Witnesses face to face.* The constitutional provision that "In all criminal prosecutions the accused hath the right to meet the witnesses face to face" has reference to witnesses in support of his prosecution, and not to witnesses in his own behalf.
18. *Affidavit for continuance.* May be read as a deposition, when, Defendant, upon a motion for a continuance, presented an affidavit as to the absence of a material witness, stating what he would be able to prove by said witness. Thereupon the Attorney-General agreed that the affidavit might be read as the deposition of the witness, but the defendant refused to agree to this. The Court thereupon overruled the motion to continue, but gave the defendant an opportunity to amend his affidavit by adding any other material facts he expected to prove by the witness, and stating that the same might be read to the jury as the deposition of a credible witness. *Held*: No error. *Petty v. State*, 326.
19. A plea of former conviction by confession on the same indictment, which shows upon its face that there never was any confession, conviction or judgment of record, is bad.
Jacobs v. State, 196.
20. *Indictment. Plea in abatement.* A plea in abatement filed by the District Attorney, without a prosecutor, by order of the Court, under the Code, sec. 5097, sub-sec. 9, that no witnesses were examined or proof taken by the Court that an indictable offense had been committed, is fatally defective, even if such plea will lie at all.
21. *Same. Different counts.* Where an indictment contained three counts, one with intent to commit murder in the first degree, another with intent to commit murder in the second degree, and the third with intent to commit manslaughter, motions to quash the indictment and to compel the Attorney-General to elect upon which count he would proceed to trial, were properly overruled.
22. *Same. Amendment.* Upon an application to re-commit an indictment to the grand jury for amendment, it is not necessary to mention the proposed amendment, and a return of the in-

CRIMINAL LAW—Continued.

dictment by the grand jury in open Court, with an endorsement on the back, signed by the foreman, showing the amendments in the indictment, and with the usual endorsement as a true bill of the amended indictment, would be good.

23. *Practice. Recalling witness.* It is in the discretion of the trial court, after one of the defendant's witnesses has been examined, to permit the Attorney-General to recall the witness, and ask a question with a view to contradict the witness.

24. *Reasonable doubt.* A reasonable doubt as to any material element of crime, or any fact essential to the defendant's guilt, will enure to his benefit.

25. *Same. Instructions.* In the absence of any special request for a further charge, it may be sufficient to say to the jury that they should acquit if the proof fails to satisfy their minds fairly and fully of an essential fact, but the defendant is entitled if he demands it, and the Court should give him the benefit of it without a demand, to the explanation that to fully satisfy the mind it must rest easy in the conclusion reached, or be satisfied of the truth beyond a reasonable doubt.

26. *Same.* Where a conviction is sought upon circumstances alone, the defendant, if he demands it, is entitled to the charge that the circumstances must be so strong and well connected as to exclude every other reasonable hypothesis but that of his guilt.

Lawless v. State, 173.

27. *Carrying pistol. Fine and imprisonment.* Imprisonment for unlawfully carrying pistols is within the discretion of the Court trying the case, and this Court will not interfere to remit imprisonment imposed in such cases, except where a gross abuse of this discretion is shown.

28. Under Code, sec. 5251, Courts rendering final judgment have no power to remit fines where the amount of the fine is fixed by statute, as in the case of unlawfully carrying arms.

Tarrant v. State, 483.

29. *Carrying arms. Officers.* Officers with criminal process to execute may lawfully go armed, but Sheriffs, Constables, Trustees, and other officers, with mere civil process to execute, are liable to indictment for carrying a pistol, except as prescribed by statute.

Gayle v. State, 466.

30. *Fees.* Where a misdemeanor case is stricken from the docket, under the Code, sec. 5193, the Attorney-General, Sheriff,

CRIMINAL LAW—Continued.

- Clerk and State's witnesses are entitled to their fees, incurred on behalf of the State, as in case of *nolle prosequi* or acquittal, to be taxed against the county. *State v. Farris*, 188.
31. *Costs. State Tax.* Where a defendant has worked out a fine and costs in the County workhouse, in default of cash payment thereof and State tax is included therein, the County is liable to pay the State tax received, to the State.
32. *Same. Forfeiture.* Where a forfeiture upon a bail bond is set aside upon payment of costs, State tax is not to be included, as such proceedings are only incidental to the original suit.
33. *Same. State and County Tax. Fine for non-attendance of a Juror.* For same reason State and County tax should not be charged where a fine was imposed for the non-attendance as a juror.
34. *Same. Same. In case of contempt.* In case of contempt the defendant should not be adjudged to pay State and County tax.
35. *Same. Same. Forfeiture against witness.* Where forfeiture is taken against a witness, which is afterward set aside upon payment of costs, it is error to include State and County tax in the bill of costs.
36. *Same. Same.* Where an execution for costs is returned *nulla bona* and a judgment against the State for the same has been paid, the defendant cannot be made to work out such costs, the remedy is by execution.
37. *Same. County liable to State, when.* The County is liable to repay the State out of money received from the wages of the convict. *State v. Sibley*, 739.
38. *Disturbing public worship.* Section 4853 of the Code is intended to protect assemblies met for religious worship. A meeting held for the enjoyment of a Christmas festival, though it was especially intended for Sunday-school scholars and their teachers and friends, does not change its character nor make it an assembly for religious worship. *Layne v. State*, 199.
39. *Arraignment and issue.* It is no ground for reversal of a judgment of conviction that the jury were sworn to try the issue joined before the prisoner had been formally arraigned and pleaded. *Wallace v. State*, 309.
40. *Circumstantial evidence. Charge of the Court. Familiar rules.* Where an offense is sought to be established by circumstantial evidence, it is error if the lower Court refuses to charge "that

CRIMINAL LAW—Continued.

the circumstances should be such as to exclude every other hypothesis than that of the defendant's guilt." It is always safer to lay down familiar rules of this character in language universally adopted and approved than to undertake to give a new version in more doubtful language.

41. *Argument.* It is the duty of the lower Court to see that no improper statements be made in argument likely to influence the jury. It is not intended to limit or restrict legitimate argument, but a statement of facts entirely outside of the evidence, and highly prejudicial to the accused, cannot be justified as argument. *Turner v. State*, 206.

DAMAGES.

See **CHANCERY JURISDICTION**, 4; **PLEADING AND PRACTICE**, 2.

DAMNUM ABSQUE INJURIA.

During the late civil war the owner of negroes who had conveyed them to a trustee to secure their purchase money, both owner and trustee residing in Tennessee, attempted to remove them from that State for greater security. The *cestui que trust* persuaded the negroes to remain. *Held*: The *cestui que trust* had the right so to do, and if loss ensued it is *damnum absque injuria*. *Brown v. Gardner*, 145.

DEED.

See **ASSIGNMENT**, 2, 3.

DEMAND AND NOTICE.

See **CHANCERY PLEADINGS AND PRACTICE**, 22, 32.

DEVISAVIT VEL NON.

See **CHANCERY JURISDICTION**, 5.

DEVISEE.

See **ASSIGNMENT**, 5.

DIRECTORS.

See **CORPORATIONS**, 2, 3, 4.

DIVORCE—EFFECT OF.

See **MARRIED WOMEN**, 2.

DOWER.

See CHANCERY PLEADINGS AND PRACTICE, 1.

1. *Widow.* Creditors filed bill to enforce debts against real estate, which had been paid for by the husband, but title conveyed to a third party. The wife insisted she was entitled to the property under a parol trust, as conveyed to a third party for her benefit. The husband died pending the litigation. The wife then claimed dower, by an amended pleading, in the event she failed to establish the trust. The Court held the trust could not be set up against creditors, not being in writing or registered, but that she was entitled to her dower, and was not estopped from asserting her right to it, by having claimed and contended for the beneficial interests under the assumed parol trust.
Martin v. Lincoln, 289.

2. *Homestead. Dissent from will.* A widow is entitled to dower or homestead where her husband makes provision for her, by will, in either personal property or real estate, or both, and dies insolvent, without formal dissent in court, as provided for in section 2404 of the Code.

3. The law presumes the testator to be at the time of his death the owner of the property bequeathed to his wife, and will allow to the widow the right of the same presumption, and she is also entitled to the informal dissent given by operation of law.

4. The fact that a small portion of the bequest has not been absorbed in the payment of debts will not change the rule above laid down—nor that in addition to the bequest there was a devise of land, for an exhaustion of the personal property may necessitate a sale of the land to pay debts.

5. The language—"a provision in personal estate"—does not preclude the idea of a provision in realty also.

Jarman v. Jarman, 671.

EJECTMENT.

See PLEADINGS AND PRACTICE, 18.

ENDORSER.

See BILLS AND NOTES; CHANCERY PLEADINGS AND PRACTICE, 19, 23.

ESTOPPEL.

See DOWER, 1.

1. The maker of a deed absolute in form, who testifies in a case to which he is no party, that he has no interest whatever in the land conveyed by the deed, is estopped from afterwards asserting that the deed was in fact a trust, and not an absolute conveyance.
2. His heir is also estopped. *Nelson v. Claybrooke*, 637.

EVIDENCE.

See PLEADING AND PRACTICE, 6, 11; BANK OF TENNESSEE, 3; CRIMINAL LAW, 17, 89; CORPORATION, 1; WILLS, 2.

1. *Preponderance*. As a general rule, a mere preponderance of evidence, however slight, must prevail in civil cases.
2. *Same*. *Libel*. *Slander*. An exception to this rule has been made in actions for libel or slander, where the defendant relies in justification on the truth of the defamatory charge.
3. *Same*. *Presumption of law*. In other civil cases involving issues or implying crime, the general rule of the preponderance of evidence prevails, but the presumption of law in favor of innocence, and evidence of good character, if produced, must be taken into consideration by the jury in ascertaining on which side the preponderance exists.
4. *Same*. It is not the preponderance of evidence in relation to particular facts in the cause, but the preponderance of the entire evidence on the issues joined, weighed in connection with the presumption of law in favor of innocence, which should prevail in such a case.
5. *Same*. *Charge of Court*. The charge in this case, although not accurately defining the proper rule, held not to be so erroneous as to require reversal, under the circumstances disclosed by the record. *Hills v. Goodyear*, 283.

EXECUTION.

1. *Issued upon insufficient affidavit not void*. An execution issued prematurely by a Justice of the Peace without a sufficient affidavit is not void, but valid until set aside, and no one can take advantage of the irregularity except the defendant, and not even he collaterally.

EXECUTION—Continued.

2. *Levy.* A levy on bulky articles in a closed cellar through a crack in the door will be good if the articles be kept in view by the officer until surrendered by the debtor.

Miller v. O'Bannon, 898.

3. *Lien. How enforced on land; debtor dying before sale.* When a lien has been fixed upon land by the levy of an execution or attachment and the debtor dies before a valid sale, the heirs have the right to demand a revivor against the personal representative and exhaustion of personal assets, before a lien can be enforced by a sale of the land.

McKnight v. Hughes, 522.

4. *Must follow the judgment.* An execution issued by a Justice of the Peace bearing a different rate of interest from the judgment upon which it is issued, will be quashed upon being brought into the Circuit Court by writs of *certiorari* and *superseas*.

Fowlkes v. Poppenheimer, 422.

EXEMPTION.

Commissioner's costs. Costs taxed in favor of a commissioner for partition of lands, and collected by execution, are not exempt in the officer's hands from application by him to the satisfaction of a *f. fa.* in his hands against the party for costs in another case.

Porter v. Cobb, 481.

FEEs.

See ATTORNEY-GENERAL, 1, 2, 3, 4, 5; CRIMINAL LAW, 29.

FEEs—CLERK'S.

See TAX SALES.

FINES.

See CRIMINAL LAW, 27.

FORFEITURE.

See ATTORNEY-GENERAL, 1, 5; LEASE, 1, 2.

FRANCHISES.

See CORPORATION, 1.

GARNISHMENT.

Answer of garnishee waives notice. The appearance and answer of the garnishee waives the objection to the notice, which, although authorized by the officer having in his hands the execution, and signed in his name, was neither written nor served by him, nor do these facts give the assignee of the judgment debtor any ground in equity to follow the fund in the creditor's hands.

Miller v. O'Bannon, 398.

GRANTOR AND GRANTEE.

See **CONTRACT**, 4.

GUARDIAN.

See **COUNTY COURT**, 3; **CRIMINAL LAW**, 14

GUARDIAN AND WARD.

1. *Security on guardian bond. Priority.* The recovery by infant wards of a decree against the personal representative of the deceased guardian for the amount due them to be paid *pro rata* with other claims, the estate being insolvent, will enure to the benefit of the sureties on the several guardian bonds in the order of liability filed by law, and sureties secondarily liable may assert their priority of satisfaction against the assignee of a surety primarily liable, who takes with knowledge of the equity.

McClellan v. Davis, 97.

2. *Sureties on bond. Priority.* The sureties on a renewed guardian bond are, under the statute, liable before the sureties on a previous bond, although the guardian appropriates the wards' funds to his own use prior to the execution of the last bond.

Crook v. Hudson, 448.

HEIRS.

See **STATUTE OF LIMITATIONS**, 4; **ESTOPPEL**, 2; **EXECUTION**, 3.

HOMESTEAD.

See **DOWER**, 1, 2.

1. By law the homestead vests in the husband and wife jointly, and is a life estate. Upon the death of either it vests in the survivor. Neither has the right to dispose of it except with the consent of the other, and then only in the mode prescribed by law.

HOMESTEAD—Continued.

2. The right of the wife is fixed during coverture, and is only lost by her voluntary alienation or abandonment, or by death.

Jarman v. Jarman, 671.

3. *Purchase money. Failure of officer to lay off homestead.* Gray borrowed from Hall an amount of money to pay for a tract of land which he bought under a decree of the County Court, giving him therefor his notes, retaining on the face of them a lien on the land. Being also indebted to one Kennedy, the latter obtained a judgment against Gray before a Justice of the Peace, and ultimately the land was sold under said judgment. In the meantime, Hall sued Gray upon his notes, and obtained judgment, which was stayed by Marchbanks. At the expiration of the stay, the land of Marchbanks, the stayor, was sold to satisfy the judgment against Gray, and subsequently Marchbanks, having taken a judgment over against Gray, his principal, redeemed from Kennedy, adding thereto the amount of his own judgment. Gray had no other land besides the tract on which he lived, and which had thus been sold. *Held*: 1. The giving of the notes for money borrowed to pay for a tract of land, although the notes recited a lien upon the land, does not make the money purchase money for the land. It is a species of security, but not such as to create a vendor's lien. 2. Gray and wife having a homestead right in the land originally sold to satisfy Kennedy's judgment, and redeemed by Marchbanks, as creditor, by reason of having paid the judgment which he had stayed, the purchaser, as well as the creditor who redeems, takes the land subject to the homestead right of the debtor. The mere fact that the officer, in selling the land, failed to assign the homestead, does not deprive the debtor of the right, nor vest a greater right, than the officer could sell, in the purchaser.

Gray v. Baird, 212.

HUSBAND AND WIFE.

See **HOMESTEAD**; **SEPARATE ESTATE**, 1, 2; **PLEADINGS AND PRACTICE**, 17.

Parol trust will not defeat creditors, when. If a husband conveys his land, by deed absolute on its face, to another person without consideration, with an intention, subsequently made known to the conveyee, that he shall hold the land for the benefit of the wife of the conveyor, such parol trust cannot be set up against creditors of the husband. To defeat the creditors, there must be a deed or declaration of trust registered or noted for registration, as required by law.

Martin v. Lincoln, 334.

IMPROVEMENTS.

See **CHANCERY PLEADINGS AND PRACTICE**, 21, 30.

INADEQUACY OF PRICE.

See **CHANCERY PLEADINGS AND PRACTICE**, 16.

INFANT.

1. *May exercise power, when.* An infant may exercise a naked power, unaccompanied with any interest or not requiring the exercise of any discretion.
2. *Power given to execute during infancy.* If a power is given to an infant, relating to his own estate, it must be inserted in the deed that he may execute it during his infancy, or his execution of it will have no effect. *Hill v. Clark*, 405.

INSOLVENT ESTATE.

See **ADMINISTRATION**, 1, 2.

INSURANCE COMPANIES.

See **CONSTITUTIONAL LAW**, 4, 5.

INTEREST.

See **CHANCERY PLEADINGS AND PRACTICE**, 7; **EXECUTION**, 4; **BILLS AND NOTES**, 2; **COUNTY COURT**, 1.

JUDGES' SALARIES.

See **CONSTITUTIONAL LAW**, 1.

JUDGMENT.

See **BANKS**, 7.

JUDICIAL NOTICE.

See **SUPREME COURT PRACTICE**, 2.

JUDICIAL SALES.

See **CHANCERY PLEADINGS AND PRACTICE**, 16.

JURISDICTION.

See **SUPREME COURT**; **CHANCERY COURT**; **JUSTICES OF THE PEACE**

JUSTICES OF THE PEACE.

No jurisdiction to enforce lien for unpaid taxes. Justices of the Peace have not the jurisdiction of a Chancery Court, under the Code, sec. 4123, sub-sec. 7, and sec. 4124, to enforce a lien on land for the taxes assessed thereon where the amount of taxes does not exceed fifty dollars. *State v. Covington*, 51.

LAND.

See **STATUTE OF LIMITATIONS**, 1, 8.

LAND SALE.

See **CHANCERY PLEADINGS AND PRACTICE**, 1; **CHANCERY JURISDICTION**, 2; **CLERK'S FEES**; **TAX SALES**.

LANDLORD AND TENANT.

Trade fixtures. As between landlord and tenant, trade fixtures, although securely fastened to the freehold, may be removed by the tenant or his assignee, if the removal can be effected without material injury to the freehold. A stipulation in the lease that the tenant should make no "alteration or repairs" without the consent of the landlord in writing, and further, in the same sentence, that he should not remove "any repairs, improvements, additions or fixtures," was held not to apply to trade fixtures. *Cubbins v. Ayres*, 329.

LAPSE OF TIME.

See **CHANCERY PLEADINGS AND PRACTICE**, 34.

LAWS OF SISTER STATES.

See **SUPREME COURT PRACTICE**, 2.

LEASE.

1. *Forfeiture.* A lease, under which the rent is payable at intervals during the term, and which provides that if the lessee fail to pay the rent as stipulated, it is to be terminated and at an end, is not forfeited by such failure to pay, unless the lessor, by some affirmative act, insist upon the condition—such as a prompt re-entry with such purpose—after demand of the rent.
2. *Same. Waiver.* A recognition of the lessee's rights after he has failed to perform the condition, is a waiver of the forfeiture.

LEASE—Continued.

8. *Construction.* The true construction of a lease which obligated the lessee to pay, during the term, the taxes that should accrue on the property, and which also provided that upon a failure to do so, he should forfeit his lease and also forfeit the right to remove the improvements placed upon the land, is that the taxes shall be paid in the ordinary course of collection without in anyway becoming a burden to the lessor. Whether paid before or after the expiration of the lease is immaterial. *Allen v. Dent*, 676

LEGISLATIVE JOURNALS.

See CONSTITUTIONAL LAW, 7, 8.

LEVY OF EXECUTION.

See ASSIGNMENT, 1; EXECUTION, 2, 3.

LIBEL.

See EVIDENCE, 2, 3, 4.

LICENSE.

See PRIVILEGE TAX, 1, 4.

LIEN.

See EXECUTION, 3; STATUTE OF LIMITATIONS, 3, 4; JUSTICES OF THE PEACE; CHANCERY PLEADINGS AND PRACTICE, 2.

LIVERY STABLE.

See PRIVILEGE TAX, 4.

MALICIOUS PROSECUTION.

See PLEADINGS AND PRACTICE, 11.

MARRIED WOMEN.

See SEPARATE ESTATE, 1, 2.

1. *Power of Attorney of.* A married woman's power of attorney for the sale of land is invalid.
2. *Divorce, effect of.* The purchaser of the husband's interest in the wife's lands, prior to the Act of 1849-50, chap. 36, sec. 1, Code, sec. 2481, abridging the husband's power of disposition, took it as it then stood, and without reference to the contingency of a subsequent divorce at the wife's instance, which, therefore, has no effect upon the rights of such purchaser.

Aiken v. Suttle, 103.

MARRIED WOMAN'S PRIVY EXAMINATION.

See CERTIFICATE.

MECHANIC'S LIEN.

See ATTACHMENT, 2.

MERCHANT TAILOR.

See PRIVILEGE TAX, 3.

MILITARY OCCUPATION.

See REGULATION OF TRADE.

MILITARY LINES.

See CONTRACT, 4.

MISTAKES.

See SUPREME COURT PRACTICE, 1, 2; CONTRACT, 1.

MORTGAGE.

See CHANCERY PLEADINGS AND PRACTICE, 32; BILLS AND NOTES, 1; RENTS, 1.

NOTICE.

See ASSIGNMENT, 2, 3; ATTACHMENT, 11; GARNISHMENT.

PARTNERSHIP.

See CHANCERY PLEADINGS AND PRACTICE, 33, 34.

PAYMENT.

See BANKS, 5.

How applied. Where two successive firms of the same name, but composed in part of different members, have had a running account with a creditor, payments made after the formation of the last firm must, unless otherwise agreed by the parties, be applied in satisfaction of so much of the account as constitutes the debt of the firm whose funds are paid.

St. Louis Type Foundry Co. v. Wisdom, 695.

PLEADINGS AND PRACTICE AT LAW.

See TRUSTEE, 2.

1. *Plea. Verdict.* The admission of one plea cannot be used to limit the effect of another, and a general verdict is always applied to the proper issue.

St. Louis Type Foundry Co. v. Wisdom, 695.

2. *Attachment. Damages, how awarded for wrongfully suing out.* Defendant in attachment suit, when the attachment has been dismissed, may proceed to recover damages at his discretion, either by motion before the Court that passed upon the original cause or by suit at law upon the bond. It is competent for the Court in which the bond was executed to ascertain and assess the damages. The motion is an independent suit, and is a substitute for an action at law upon the attachment bond.

Macheca v. Panesi, 544.

3. *Trespass. Conversion.* A single act affecting chattels, which the owner of the chattels has the right to elect to treat either as a trespass or as a conversion of the chattels, is an entirety, and cannot be treated as a trespass as to one of the chattels and as a conversion as to the other.

Allen v. Dent, 676.

4. *Special verdicts.* The practice of allowing juries to return a special verdict in the event they cannot agree on a general verdict, has frequently been followed in the courts of this State, and is not without precedent or authority.

Keith v. Clarke, 718.

5. *Restitution.* If the defendant pay a judgment which is afterwards reversed, he may have an order on the plaintiff, or on his personal representative, if the plaintiff be dead, for the amount so paid to be restored to him.

6. *Same Evidence. Payment.* The fact of payment may be shown by parol evidence.

7. *Same.* Money received by the plaintiff from a party defendant, as the price of the judgment under an agreement, in form a sale, is, in effect, a payment, and, as such, will be ordered to be restored, if the judgment be subsequently reversed.

8. *Admissions of Counsel.* Admissions of counsel in argument, made under a misapprehension, may be retracted, but the real facts must be made to appear.

Gates v. Brinkley, 710.

9. *Prosecution bond. Rule to justify or give new security.* After a Circuit Judge has once entertained an application for the en-

 PLEADINGS AND PRACTICE AT LAW—*Continued.*

largement of a prosecution bond and accepted the sureties, he cannot be required to make a rule upon the plaintiff to justify or give new security upon affidavits stating no new facts, where the penalty of the bond is sufficient to cover the costs and damages which may be awarded.

10. *Change of venue. Court of same jurisdiction. Judge should select.* Upon a change of venue, if there are two courts of the same jurisdiction in the county to which the venue is changed, the Judge ordering the change must select the court to which the transfer is made, and his action cannot be revised in the absence of anything showing an abuse of discretion.

11. *Malicious prosecution. Evidence. Malice.* In an action for malicious prosecution, the defendant is entitled to testify as to his belief of the guilt of the plaintiff when he commenced the prosecution against him, and that he instituted the prosecution without malice.

12. *Same. Probable cause.* In an action for malicious prosecution, it is error to charge the jury that the law would infer malice from the absence of probable cause.

Greer v. Whitfield, 85.

13. *Ejectment.* In an action of ejectment it would be a good defense, under the plea of not guilty, that the plaintiff, who sued as a foreign corporation, was not in fact a corporation.

14. *Practice. Charge of Court. Evidence of incorporation.* Upon the question of the incorporation of a company, it is error to charge that the mere execution of a deed to the company by one party, and of a new deed in confirmation by the devisee of that party, would not be sufficient proof of user of franchises to establish the incorporation. The jury should have been left to draw their own inference.

15. *Same. Same. Declaration. New count.* It is error to charge that under the present mode of proceeding in ejectment, a person in whose name a new count is filed becomes a substantive and distinct party, whose recovery would be antagonistic to the rights of the original plaintiff.

16. *Same. Same. Same. Amendment. Statute of limitation.* If there be privity between the plaintiff and a new party in ejectment, as where the relation exists of vendor and vendee, an amendment by the declaration by the addition of a count in

PLEADINGS AND PRACTICE AT LAW.—Continued.

the name of such party, would relate back to the commencement of the suit so as to obviate the bar to the statute of limitations. *Augusta Manuf. Co. v. Vertrees*, 75.

17. *Writ of replevin. Amendment.* A writ of replevin sued out before a Justice by a wife for property seized by the defendant under execution against the husband, may be amended in the Circuit Court by joining the husband with the wife as plaintiff, upon the execution of a new bond. *Sheron v. Hull*, 498.

POWER.

See **INFANT**, 1, 2.

POWER OF ATTORNEY.

See **MARRIED WOMEN**, 1.

POSSESSION.

See **STATUTE OF LIMITATIONS**, 1.

Adverse. Assurance of title. A partition of specific lands, under a general devise, by will, of all the residue of the testator's estate, real and personal, made in writing by persons especially authorized by the will, is an assurance of title, within the Code, sec. 2793, which will vest the parties with a good title to their allotments by adverse possession for the time prescribed. *Thurston v. University of N. C.*, 513.

PRESUMPTION OF LAW.

See **DOWER**, 3; **EVIDENCE**, 3; **BANK OF TENNESSEE**, 2.

PRIORITY

See **GUARDIAN AND WARD**, 2; **ASSIGNMENT**, 3, 4, 5; **ATTACHMENT** 1.

PRIVILEGE TAX.

See **CONSTITUTIONAL LAW**, 3.

1. *Theater.* A license "upon the privilege of keeping a theater, opera house, or concert hall, where theatrical entertainments are given," includes entertainments given by companies hired by the proprietors or lessees, and such companies are not liable to an additional tax.

PRIVILEGE TAX—Continued.

2. *Sama*. "Theatrical entertainments" are not confined to the pure drama, but may include negro minstrel performances.

Taxing District v. Emerson, 812.

3. *Merchant tailor*. The merchant tailor or his agent, who sells by sample, taking measures and sending the clothing from another State, is liable to the privilege tax.

Singleton v. Fritsch, 93.

4. *License. Livery stable*. Under the Act of 1879, authorizing the Taxing District to assess and collect license tax for livery stable, and also shed yards, a licensed livery stable keeper may keep stock and vehicles under a shed without an additional license.

Taxing District v. Brackett, 823.

PRIVIES.

How created. The relation of privies may be created by operation of law, by descent or by voluntary or involuntary transfers from one person to another, and denotes mutual or successive relationship to the same rights of property.

Nelson v. Trigg, 701.

PROBATE COURT.

See **COUNTY COURT**, 2.

PROBATE—DEFECTIVE.

See **CERTIFICATES; CHANCERY PLEADINGS AND PRACTICE**, 32.

PURCHASE MONEY.

See **HOMESTEAD**, 2.

RECEIVER.

See **CHANCERY PLEADINGS AND PRACTICE**, 5; **SUPREME COURT PRACTICE**, 5, 6.

RECISSION.

See **CONTRACT**, 1.

REGISTRATION.

See **CERTIFICATE; ASSIGNMENT**, 2, 3; **HUSBAND AND WIFE**.

REGULATION OF TRADE.

Per Malone, Sp. J.: The United States had the right to place whatever restrictions it saw fit upon the trade between citizens of the Confederate States within its lines of military occupation and those without those lines, and when these restrictions are announced through the proper department it is the duty of the State Courts to observe and enforce them.

Brown v. Gardner, 145.

REMAINDER.

See **CHANCERY JURISDICTION, 1.**

REMAINDERMEN.

See **STATUTE OF LIMITATIONS, 2, 3, 5; CHANCERY PLEADINGS AND PRACTICE, 25.**

RENTS.

See **CHANCERY LEADINGS AND PRACTICE, 21; BILLS AND NOTES, 1; CONTRACTS, 6.**

1. *On mortgaged property.* Rents accruing upon property conveyed to a trustee for the benefit of creditors, between the execution of the deed and sale, in the absence of a contrary disposition, are the property of the conveyor.

2. *Set-off.* If, however, past due rents are conveyed which was subject to set-off by a debtor in a suit by the conveyor, they will be subject to the same set-off when demanded by the trustee.

Litterer v. Berry, 193.

RENTS AND PROFITS.

See **CHANCERY PLEADINGS AND PRACTICE, 23.**

REPLEVIN.

See **PLEADINGS AND PRACTICE, 17.**

RESTITUTION

See **PRACTICE AND PLEADINGS, 5, 6, 7; CHANCERY JURISDICTION, 3.**

REVIVOR.

See **CHANCERY PLEADINGS AND PRACTICE, 4, 5; EXECUTION, 3.**

SALE OF LAND.

See CHANCERY PLEADINGS AND PRACTICE, 13; CONTRACT, 1.

SECESSION.

See CONTRAT, 5.

SEPARATE ESTATE.

1. *Feme covert. Power to convey.* The separate estate of a married woman, where the deed or conveyance under which she holds is silent as to the power of disposition, only differs from her general estate in the fact that the husband's marital rights are excluded and such separate estate may be conveyed by the joint deed of the husband and wife, executed as required by law; but it is otherwise where the power of disposition is withheld or confined to some particular mode.

Parker v. Parker, 392.

2. *Chattel.* When a chattel is purchased from the husband by a stranger, and at once given to the wife for herself, the transaction, from its very nature, would confer upon the wife a separate estate.

Sherron v. Hall, 498.

SET-OFF.

See CHANCERY PLEADINGS AND PRACTICE, 21; RENTS, 2.

SPECIAL REQUEST.

See ADMINISTRATOR, 1, 2.

STATE.

See CONTRACT, 5.

STATE TAX.

See CRIMINAL LAW, 30.

STATUTE OF LIMITATIONS.

See CHANCERY PLEADINGS AND PRACTICE, 83; PLEADINGS AND PRACTICE, 16; BANKS, 6; COMPENSATION; ADMINISTRATION, 1, 2; ADMINISTRATOR, 3.

1. *Color of title. Voidable deed.* A naked trespasser without color of title cannot transmit his right to a successor so as to enable the latter to couple the two possessions to form the bar of the statute of limitations, but those having color of title

STATUTE OF LIMITATIONS—Continued.

may transfer or convey their right by conveyance so as to enable the holder to connect successive conveyances and possessions with his own right and possession, and this, though one of the conveyances was voidable. *Nelson v. Trigg*, 701.

2. *Will not run against note executed to a Clerk.* The statute of limitations does not run in favor of the maker or sureties of a note executed to a Clerk for property sold in the progress of a suit in court, and while the note is in the custody of the law. *Tyner v. Fenner*, 469.

3. *Vendor and vendee.* The rule that the statute of limitations will not bar the vendor's lien for purchase money is confined in its application to the vendor and vendee, and will not affect the intervening rights of innocent third parties. *Whitby v. Armour*, 683.

4. *Creditors. Real estate of intestate. Lien. Purchaser from heirs of intestate.* Creditors of an intestate have no such lien on the real estate of the intestate as will prevent the bar of the statute of limitations in favor of the purchaser of the heirs of the intestate. *Nelson v. Trigg*, 701.

5. *Remainder.* The statute of limitations does not run against a remainderman until, by the termination of the particular estate, the right of possession has accrued.

Aiken v. Suttle, 103.

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SUBROGATION.

See CHANCERY PLEADINGS AND PRACTICE, 25.

SUPREME COURT.

Jurisdiction. Writ of possession before hearing. The Supreme Court has no jurisdiction to award a writ of possession on a decree of the Chancery Court, nor on its own order, except after a hearing and decision on the merits. *Terry v. Clark*, 186.

SUPREME COURT PRACTICE.

1. *Mist ke.* The alleged mistake of the Clerk of the inferior court, omitting the names of some of the applicants as parties in an appeal bond, cannot be corrected in the Supreme Court after the disposition of the appeal. The Court might, in the original cause, before final determination, have granted permission to amend a defective bond, and complainants also had their remedy by writ of error, but such mistake cannot be the object of a new bill. *Duval v. Brady*, 528.
2. *Laws of sister States. Judicial notice. Query.* Whether this Court will reverse for want of proof of the law of a sister State, of the existence of which the Court is authorized to take judicial notice. *Sherron v. Hall*, 498.
3. *A decretal order will not be modified at a subsequent term of the Court.* A decretal order will not be modified at a subsequent term by this Court, upon grounds which might and should have been urged when the order was made, nor at all after it has been executed, unless, indeed, in a very extraordinary case. *Myers v. James*, 370.
4. *Appeal in suits on bond or motion to award damages in attachment suits.* Appeal from the judgment on motion to assess damages in attachment suits, or from a suit at law on bond, does not carry to Supreme Court for its revision the judgment or decree in the original cause. *Machea v. Panesi*, 544.
5. *Application for a receiver.* An application to this Court for a receiver, based upon the same facts on which the Chancellor had refused a similar application, cannot be entertained. *Allen v. Harris*, 190.
6. *Appointment of a receiver. Unpaid taxes.* It is a good ground for the appointment of a receiver of land in a suit pending in this Court, where the decree below declares the applicant to have a lien on the land for the payment of a debt; that there are taxes due and unpaid which are about to be enforced by a sale of the land, unless the party in possession will pay the taxes in a reasonable time. *Darusmont v. Patton*, 597.

SURETIES.

See **GUARDIAN AND WARD**, 1, 2.

TAXES.

See **SUPREME COURT PRACTICE**, 6; **CLERK'S FEES**; **JUSTICES OF THE PEACE**; **CHANCERY PLEADINGS AND PRACTICE**, 5; **BANK OF TENNESSEE**.

TAX SALES.

Clerks' fees. Section 5, Act of 1879, chap. 245, construed to mean that the State is not to pay the fees of Clerks in cases where the lands have been previously sold by the State, and not redeemed at the time of second sale, but in such cases the Clerk may collect the fees from the delinquent tax payer.

Uhl v. Guines, 852

TENANTS IN COMMON.

See **CHANCERY PLEADINGS AND PRACTICE**, 20.

THEATER.

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TRADE FIXTURES.

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TRUST FUND.

See **TRUSTEE**, 1.

TRUST—PAROL.

See **HUSBAND AND WIFE**.

TRUSTEE.

See **DAMNUM ABSQUE INJURIA**; **CHANCERY PLEADINGS AND PRACTICE**, 6, 7.

1. *Trust fund.* A trustee may assign an order or decree in favor of the trust estate for a valuable consideration, the proceeds of such assignment enuring to the benefit of the trust estate, but he has no power to borrow money for his own use and transfer or assign such orders or decrees as collateral security, and a party who accepts such an assignment cannot be considered either as a legal or equitable assignee.

2. *Resignation. Res adjudicata.* Upon a petition filed by a trustee to make final settlement and resign, questions which are not directly presented to and passed on by the Court cannot be considered as *res adjudicata*, and the *cestui que trust* is not estopped from denying the correctness of the amount as due to or by him, when such indebtedness was not directly investigated by the Court. *Brewster v. Galloway*, 558.

USER.

See CORPORATION, 1.

USURY.

See CONTRACT, 2.

VENDOR AND VENDEE.

See CHANCERY PLEADINGS AND PRACTICE, 11; STATUTE OF LIMITATIONS; ASSIGNMENT. 5; CONTRACT, 1.

VENDOR'S LIEN.

See CHANCERY PLEADINGS AND PRACTICE, 11.

1. *Notes for purchase money. Assignee.* Notes were executed for the purchase money of a tract of land, lien being retained. The vendor transferred one of the notes, guaranteeing that the note should be paid in preference to the others. *Held*, that the holder of the note was entitled to priority of payment, as against the vendor or his subsequent assignee.
2. *Same. Surety.* Where several notes have been executed for purchase money, one of which is secured by personal security, and the surety pays the note for which he is liable, he is not entitled to be reimbursed out of the proceeds of the land sold to pay balance of the purchase money until the same has been paid in full. *Menken v. Taylor*, 445.

VENUE—CHANGE OF.

See PRACTICE AND PLEADINGS, 10.

VOIDABLE DEED.

See STATUTE OF LIMITATIONS, 1.

WAIVER.

See LEASE.

WARRANTS.

See COUNTY COURT.

WIDOW.

See DOWER.

WILLS.

See DOWER; POSSESSION—ADVERSE; CHANCERY PLEADINGS AND PRACTICE, 1.

1. *Construction.* Real estate is devised by will to several children of the testator, but conditioned that no division be made until the youngest became of age, and if at that time any of his children have died, leaving children, that they be entitled to such share as their parents would have been entitled to if alive. Before a division of the property could take place under the provisions of the will, a daughter of the testator died, leaving surviving her a child. *Held:* That the interest of the deceased daughter vested in her surviving child, and was not subject to any creditor of the deceased daughter. *Buttle v. House, 302.*

1. *Legacy. Subsequent gift. Ademption. Proof must be clear and satisfactory.* A legacy of \$5,000 by will; subsequent gift of valuable lot. *Held:* On the face of the two transactions no presumption arose of ademption. Both gifts being in writing, the Court does not decide whether parol proof could be introduced to show the *purpose* of satisfaction on the part of the testator, but conceding for the argument it may be done, that such proof must be clear and satisfactory, and evidence of loose conversations, in which testator spoke of the gifts and a purpose to alter his will, or that he was not able to give the legacy after the gift of the lot, is not such satisfactory evidence.

Evans v. Beaumont, 599.

WITNESSES UNDER THE RULE.

See CRIMINAL LAW, 3.

WRIT OF POSSESSION.

See SUPREME COURT.

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